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ಕಾರಂತರ ಸಂಗ್ರಹ

ಎರಡು ಪುಸ್ತಕಗಳು.

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K. R. KARANTH

A TREATISE

ON

Malabar & Aliyasanthana Law.

BY

P. R. SUNDARA AIYAR, B.A., B.L.

Late Judge of His Majesty's High Court of Judicature at Madras.

Revised and brought up-to-date

BY

B. SITARAMA RAO, B.A., B.L.

Vakil, High Court.

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PREFACE.

As is well known contributions were made to the Madras Law Journal from time to time on various topics of Malabar Law by the late Mr. Justice Sundara Aiyar when at the bar. Coming as they did from one with his unique knowledge of the conditions of Malabar, they were very highly regarded by the profession and in fact have been of the greatest assistance in settling the law. When he became Judge, he endeavoured to give effect to some of his views, for instance as to junior members' right to maintenance, which have since been accepted by other Judges. His premature death prevented him from dealing with all the topics of Malabar Law and from the very nature of the case as some of his views have been accepted the arguments with which he endeavoured to support them have ceased to interest practitioners. Still much remains that is of permanent interest and it was suggested that those articles might with advantage be reprinted with such modifications as time and progress of ideas have necessitated. While so doing, it was thought that further chapters also might be added dealing with all the topics of Malabar and Aliyasanthana law which he himself would have dealt with if he had lived longer. Chapters on Adoption, Partition, Marriage, Succession and inheritance, Branch property, Individual property, Representation in suits, Land Tenures, and Aliyasanthana law have accordingly been added. Certain appendices setting forth the legislative enactments of British India, Cochin and Travancore touching the subjects dealt with as well as the Sudder Court Proceedings on the Land Tenures of Malabar, lists of castes governed by Marumakkathayam, Makkathyam and Aliyasanthana system and Bhutala Pandya's Kattukattalai and a glossary of terms have been added to make the book as comprehensive as

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possible. Every attempt has been made to make the references exhaustive and up to date. Mr. Moore's book on Malabar Law useful as it was, has long been out of date and it is hoped that the book will meet a real need.

My thanks are due specially to Mr. T. S. Visvanatha Iyer B.A. M.L, of the Madras Bar who has compiled the index with the greatest care so as make it full and accurate. He has also verified the references and gone through the proofs.

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ADDENDA ET CORRIGENDA.

p. 21 for footnotes l. 2 Read (1915) I. L. R. 42 Cal 1179 for 17 T. L. R. 39.
p. 46 l. 13 Read 'in' for 'on'
" " 21 " 'lender or' 'for 'lender.'
" 162 " 24 omit "as a act".
" 174 " 17 read 'but' for 'that'.
" 183 " 20 omit the words "case their Lordships say".
" 187 " 24 add at the end of line "person could validly".
" " 27 omit the words "person could validly".
" 199 Read "Kovil" for Kovilagom".
" 200 Read line 30 as "No Nair female can".
" 205 " 14 Read "Hindus" for "Hindu"
" 220 l. 12 add the words 'in marriage', after 'daughter'.
" 228 " 17 add the words "and take part" after "alive".
" 232 " 29 Read 'the new" for 'that'.
" 240 " 1 Read 'them' for 'they'.
" 248 " 5 Read "Bajains" for "Kajains"
" 259 " 27 Read 'Stani' for 'state'.
" " " 28 Read 'be' for 'he'.
" 261 " 8 read 'or' for 'of'.
" Footnote 3 add : I. L. R. 26 Mad. 540.
" 268 " 24 read 'and' for 'or'.
" 278 " 10 add "*Puramathan* v. *Sankara*" after "followed in".

" footnote 7 add "As to the effect of a decree obtained in the absence of one of the trustees I. L. R. 11 Mad. 191 ; but see S. A. 1950 of 1920 and next case.

" 329 " 14 Read 'Masadika" for 'Maradika".
" " " 20 " "Sapaligas" for "Sapaliyas".
" 331 " 27 " "Nirmalaya" for "Niromalaya',
" 332 " 12 " "Muriyo" " "Muraiyi".
" 333 " 28 " "Budhavalthi" " "Budhavauthi".
" 344 " 20 " 'hardship" " 'heardship'.
" 347 " 30 Read (iii) for 'ie'.
" 547 " 25 add at the end of line "bers cannot claim",
" 352 " 24 omit.
" 359 " 15 add at the end of line 'is not of a small cause nature".
" 365 " 34 read "is not entitled" for "is entitled"
" 352 " 40 omit 'in'.
" 366 " omit l. 23.
" 367 " 28 Insert "*Velluthaumma* v. *Pathuma*" after 30 M. L. J. 203.
" " Read 17 I. C. 131 for 17 M. L. T. 131.
" 370 " 10 Read 'reduction' for 'restriction'.
" 147 " 25 'cultivators' for 'cultivation'.
" 453 " 27 Read 'path' for 'part'.

A Treatise on Malabar & Aliasanthana Law

CHAPTER I.

INTRODUCTION.

1. Malabar Law, not *sui generis*. 2. Difficulty, admixture of usages—Nambudiries—Pattars—Tiyas—Mappillas—Mukkuvas—Cheruman etc. peculiarities. 3. Aliyasanthana Law. 4. Subjects dealt with, peculiar features, marriage, adoption, Land Tenures. 5. Legislation.

THERE is, perhaps, no district which contains such a miscellaneous collection of communities, as Malabar. Outsiders regard the district as full of mystery, having no definite conception of it or of the people that inhabit it. Even Judges are afraid to grapple with the questions which arise for solution with regard to succession or the land tenures of the District. On the surface, the customs of the District, undoubtedly, appear to be very dissimilar to those elsewhere and this apparent dissimilarity has led to a notion that Malabar is a world by itself and that Malabar Law is a body of usages and customs that have nothing in common with the Hindu Law that prevails elsewhere in Southern India. But the inhabitants of Malabar are as much Hindus as others are and in their religious and social life they are governed by the same Sastras that govern the rest. So far as the law of joint family is concerned, barring impartibility, the law of the Nayars and the law of the Nambudiries differ but slightly from the Hindu Law according to the Mitakshara. There is really no justification for supposing that questions of Malabar Law are *sui generis*, bearing no analogy to the Mitakshara Law and incapable of deriving any assistance for their solution from the decisions under that law. Even in the matter of land tenures, beyond differences in nomenclature and certain other necessary differences due to local conditions, there is very little difference in substance between the tenures in Malabar and elsewhere.

2. The real difficulty, in Malabar is that it presents a considerable admixture of usages, of those obtaining amongst the communities that originally occupied Malabar and of those that migrated to it from other countries. The indigenous inhabitants are supposed to be those governed by Marumakkathayam Law, that is to say, the Law of succession through nephews. These are the Nayars and some other classes below them constituting the major portion of the Malabar population. The Nambudiries or the Brahmins of Malabar are not really an indigenous sect, but immigrants of a very early date. According to Mr. Justice Muthuswamy Aiyar' [1] they migrated to Malabar about 12 or 15 hundred years ago. There is a tradition that their original place was on the banks of the Godavari in the Telugu country. A great deal may be urged in support of this tradition. That the immigration was from the north, possibly through Canara is supported by the fact that while the Brahmin immigrants from the East are wholly unaffected by Malabar usages the process of absorption of the Brahmins of Canara into the Nambudiri community is, it would seem, still continuing. But for our purpose, it is not a matter of much importance where they came from. Whichever may have been their original abode they came so far back (for certain, they came before the days of Sankaracharya) that any comparison of their ways with the ways of the people of the place they came from is not likely to be of more than antiquarian interest. Nambudiries when they came, it might be assumed, carried their law with them, that is, the Hindu Law as it was understood at the time of their migration. Except in the case of a few families in the Payyanor Amsom in the Cherakal Taluk, they have not adopted Marumakkathayam system wholesale. Only in some respects they have adopted the usages of the Marumakkathayam community. The law governing Nambudiries is, accordingly, the Mitakshara Law

1, *Vasudevan* v. *Secretary of State for India* (1887) I. L. R. 11 Mad. 177 at 181.

modified by Marumakkathayam usages. As a result, the law of the Nambudiries at present is as peculiar as the Marumakkathayam law itself and in many cases even more difficult of ascertainment and definition. But the Nambudiries were only the first batch of immigrants. Various classes have since from time to time migrated to Malabar from different parts of Southern India, and have, in course of time, in greater or less degree allowed their own personal laws to be modified by the Marumakkathayam Law. When the question arises as to the law by which a particular community is governed, it is always important to ascertain whether the community are immigrants of a recent or an early date. It may, perhaps, at once be stated that one large and important class of immigrants have remained absolutely untouched by the customs of Malabar, namely, the Tamil Brahmins, known as Pattars, whose principal original settlement was in the Taluk of Palghat. It will be unnecessary to speak of this class again in connection with Malabar Law, as they in no way differ from the Tamil Brahmins in other Districts of the Presidency. But the non-Brahmin communities that immigrated to Malabar have not remained untouched. They have, in many cases, become closely assimilated to the indigenous communities. But still it will be found that they have rarely adopted all the usages governing the Marumakkathayam Nayars, and especially have they shown disinclination to follow them in matters relating to marriage. It will thus be found (what at first strikes a foreigner as curious) that while amongst the indigenous high class Marumakkathayam Sudras there is absence of legal marriage, such is not the case amongst several classes that are far below them in social scale. In the case of these communities the chief diffculty is to find out what rules of their ancient personal law they retain, and on what point or points they have adopted the rules they found obtaining among the Marumakkathayam community that was in occupation of the country of their adoption. One of these communities is the

industrious and thriving community of Tiyas or Eluvas, whose original home is by many supposed to be the Island of Ceylon. In South Malabar, the Tiyas generally retain their own law of succession in the line of sons. They have some peculiar customs which are in a large measure due to the imperfect development of the idea of separate property among them and to some extent also due to the influence of Marumakkathayam Law. In North Malabar, they show far greater resemblance to Marumakkathayam Nayars and in fact are governed by the Marumakkathayam system. It is a question whether the Tiyas of North Malabar were immigrants at all from foreign lands. In Travancore, and it is believed also in Cochin, the law governing Tiyas or Eluvans is a hybrid of Makkathayam and Marumakkathayam rules, what is called a *misravazhy* or mixed path. The Marumakkathayam Law obtains not only amongst the Hindus but also amongst the Mappillas, a class of Muhammedans, in North Malabar, who speak Malayalam. This is due to the fact that they were converts from Hinduism and did not change their law of property when they changed their religion. While therefore, the religion of Mahomed and the ordinances of his followers govern their religious and social life, it is strangely intermingled with the rules of property and of succession that govern the Nayars. Their rules of marriage are exactly identical with those that govern other Muhammedans but their rules of property are regulated according to Marumakkathayam Law. Sometimes we find the rules of Muhammedan Law modifying those of Marumakkathayam Law, especially with regard to self-acquired property and this admixture at times gives rise to certain curious problems, by no means, easy of solution. By reason of recent legislation (Madras Act I of 1918,) these problems will soon cease to have any practical interest. S. 3 of that Act enacts that the property of a Mappilla intestate shall devolve upon his heirs in the order and according to the rules of Muhammedan Law. The usages of those Tiyas and

Muhammedans who are governed by the Marumakkathayam Law are generally the same as those governing the Nayars and require no special notice. A list of the classes or castes governed by the Marumakkathayam and Makkathayam or modified Hindu Law is given in Appendix (A). The aboriginal tribes of Malabar of whom the Mukkavar, Cheruman, Pulayan, Kurumban and Nayadis are examples, are governed by their own usages which have not, as yet, been ascertained with any precision.

3. The Aliyasanthana Law of Canara while agreeing in the main with the Malabar Law, in some respects departs from it. A list of castes governed by this system is given in Appendix (B). A translation has also been given of extracts from Bhutala Pandya's Kattu Kattalai the only available indigenous account of Aliyasanthana Law whose genuineness has indeed been impeached but which is nevertheless of value as a record of the usages of the people governed by this system of law. (See Appendix C.)

4. Apart from legislation (for which. see appendix) marriage need but remotely concern the student of Malabar Law. The expenses of the marriage of a junior member may be a valid charge on the estate and may justify an alienation by the Karnavan or failure to perform it may form a charge against him. The expenses of maintaining the wife and children may affect the rate of maintenance awarded to a junior member. Beyond this, marriage does not enter into the scheme of Marumakkathayam or Aliyasanthana Law. Another thing that will strike the reader in connection with the family law of Marumakkathayam and Aliyasanthana people is the comparative paucity of precedents on adoption, a subject which bulks so largely in treatises on ordinary Hindu Law. The reason is not far to seek. As observed by Mr. Holloway, there is a certain amount of absurdity involved in the idea of the adoption of a nephew (A S. No. 183 of 1861, Tellicherry) ; and besides the family being generally

large, there is occasion but rarely for the exercise of the power. Adoption cannot take place without the consent of all the members and the males at any rate prefer to take the chance of becoming the last surviving member when they can pass the property on to their wives and children. In 1858, Mr. Holloway spoke of it as a singular and unheard of process (A. S. No. 236, of 1858, Tellichery) and it more or less remains the same even to-day. The few cases of adoption are from Canara and in them the persons adopted were generally children of the adopter and almost always there was a malikhana to be secured by the adoption. Among the Nambudiries, adoption occupies a much more important place and presents all the problems and some in addition to those presented by the Hindu Law. Another subject which is very little in evidence is Inheritance. The land tenures of Malabar though they are not, as said before, *sui generis* yet present peculiar features which with their special nomenclature require careful study. The tenures of Canara also have some special features but in one respect they agree with tenures in Malabar *viz.*, the tenant is always allowed the value of the improvements though there is no statute regulating payment therefor as in Malabar.

5. Interesting experiments in legislation have been made in Travancore in the Kudiyan and Jenmi Regulation and the Nair Regulation and in Cochin in the Cochin Nair Regulation with what success it remains to be seen. These have been printed in an appendix.

CHAPTER II.

JOINT FAMILY—PARTITION AND RE-UNION.

6. Joint family, constitution—Effective rights of members, 7 Equality of rights —Equal division or Division per capita, 8 Authority and reasons in support of equal division, 9 Stirpital division, authority for,—Safe rule, 10 Impartibility, rule of—Creature of courts—Partition only with consent of all, settled rule, 11 Rule when some minors—Two views—Liberal view —Partition by adults binding in the absence of fraud—Intention to divide and division, when divisible, 12 Partition indicia of—Burden of proof, 13 Partial division—Effect of on survivorship. 14 Reunion — Rule if applicable—Difficulties. 15, Restrictions—Indicia of,—Who can reunite— Effect, 16 Loss of caste — Effect of— Right of maintenance unaffected —Karnavanship—Conversion—Tenants-in-Common—Full Bench.

THE joint family in a Marumakkathayam Nayar tarwad consists of a mother and her male and female children, and the children of those female children, and so on. The issue of the male children do not belong to their tarwad but to the tarward of their consorts. The property belonging to the tarwad is the property of all the males and females that compose it. Its affairs are administered by one of those persons, usually the eldest male, called the karnavan. The individual members are not entitled to enforce partition but a partition may be effected by common consent. The rights of the junior members are stated to be (1) if males, to succeed to management in their turn (2) to be maintained at the family house (3) to object to an improper alienation or administration of the family property (4) to see that the property is duly conserved (5) to bar an adoption and (6) to get a share at any partition that may take place. These are what may be called effective rights [1]. Otherwise everyone is a proprietor and has equal rights.

7. Supposing there are three daughters with an unequal number of children the children by one daughter cannot, as

1. *Iravan* v. *Komemuthi* (1892) I. L. R 15 M. 501 ; *Chandu* v. *Subba* 1889) I. L. R. 13 M. 209 ; *Moidin Kutty* v. *Krishnan* I. L. R. 10 M. 322 at 330.

a body, claim an equality of rights with the children of another daughter. In fact, the family consists of individuals with equal rights and the law does not recognise any rights in branches as such. Supposing a division takes place with the consent of all, everybody, whether male or female, adult or infant, would be entitled to an equal share. A tarwad, no doubt, is said to consist of so many Tavazhis, *i.e.*, lines of mothers, and when a division takes place, it is generally split up according to Tavazhis, that is, those descended from the same mother, or it may be from the same grandmother, while separating themselves from the tarwad as a whole form themselves into a new tarwad instead of living separately as individuals. But this is only for convenience sake, and it is not the fact that children by one mother are given as much as children of any of her sisters irrespective of the number of the children that each has. In other words division is made not per stirpes, but per capita. Nor is it always the case that the children of one mother or the members of one Tavazhi live together after a division. Sometimes members of different Tavazhis remain together undivided while members of the same Tavazhi prefer to live separated. In-as-much as the Courts have laid down that there can be no division in a Marumakkathayam tarwad, except with the consent of all the members, the question as to what the share of each individual is has rarely arisen for consideration. It has to be determined by mutual consent, for in the absence of such consent there could be no division at all. But suppose there are minors in a family, and the adult members acting together on behalf of themselves and the minors divide the properties : the question would then arise " in what manner they should effect a division, so that it may be binding on the minors ? " It seems to stand to reason that every member should have an equal right. For, suppose the common ancestor had one daughter and five sons, and the daughter has a number of children, some of whom are daughters, and these latter again have a number of children each ; effecting a division per

stirpes would mean that the five sons would be entitled to five-sixths of the property, with power to alienate and only a sixth of the family property would remain available for division amongst those who continue the tarwad. Again if each of the males amongst the children of the daughter takes away as much as each of the sisters with their children with power to alienate, a very small fraction indeed of the property would descend to those who can continue the tarwad. This is probably the reason why the understanding amongst the people always has been that every individual born in the tarwad has an equal right with every other individual.

8. The rule in respect of valuation for court-fee purposes of junior member's suits (See Appx. D.) as well as the decisions on which the rule is based proceed upon the assumption that the interests of all the members are equal [1]. No doubt at one time it was thought that females had somewhat higher rights than males [2]. It used to be said that property vested in them but the only sense in which this statement can be said to be true is that while the children of the former become on their birth co-owners, the children of the latter being members of altogether different tarwads take no interest in the tarwad property. There could be no alienation except with the consent express or implied of all the members whether male or female nor could any adoption or partition take place without their similarly consenting [3]. There is no difference in the extent or quality of beneficial enjoyment to which individual members are entitled. [4] Under the

1. *Iravan Kunhi* v. *Komamuthi Kova* (1892) I. L. R. 15 Mad. 501 ; *and Panga v. Unnikutti* (1900) I. L. R. 24 Mad. 275.

2. *Subbu Hegdi* v. *Tongu* (1869) 4 M. H. C. R. 196. *Varankoi Narayanan Namburi* v. *Varankot Narayanan Namburi* (1880) I. L. R. 2 M. 327.

3. *Raman Menon* v. *Raman Menon* (1900) I. L. R. 24 Mad. 73 P, C. *Chendu* v. *Subba* (1889) I. L. R. 13 Mad. 209 *Veluthakkal Chirudevi* v. *Veluthakal Karnavan Kelappan Nair* (1916) 31 M. L. J. 879, *Kunhi Pocker* v. *Kutti Haji* (1905) I. L. R. 29 Mad 62.

4. *Govindan Nair* v. *Naraina Nair* (1912) 23 M. L. J. 706 *Achyutan Nair* v. *Kunjumi Nair* (1903) 13 M. L. J. 199 *Narayani* v. *Govindu* (1885) I. L. R. 7 Mad. 235.

Marumakkathayam system, ordinarily the male it is that is entitled to manage while under Aliyasanthana system the senior in age whether male or female manages. Even under the Marumakkathayam system, in the Kovilagoms of the Zamorin's family and in some other well-known families and in all cases where there are no adult male members, the senior female manages. The last member of a tarwad whether male or female has power to alienate the tarwad property [1]. The Cochin Nair Regulation S. 41 adopts this view.

9. Although these considerations would seem to be fairly conclusive on the question as to how the shares should be allotted on a partition it must be conceded that there is a considerable body of authority on the other side. In 1810, the Provincial Court of Western Division seems to have held: " if partition is made it must be per stirpes and not per capita. " See Moore's Malabar Law p. 12. Mr. Strange in his Manual on Hindu Law at page 389 says the same thing. See also Grady's Hindu Law, page 310. In practice, the division is generally by branches. In *Timma* v. *Daramma* [2] (an Aliyasanthana case) and *Amma* v. *Krishnan Menon* [3] both cases of succession it is assumed that division is to be per stirpes. Dr. Pandalai in his monograph on Succession and Partition at p 147 refers to a case in Travancore in which the point directly arose and was so decided [4]. A number of other rulings are also referred to by him in which stirpital division was recognised as the rule [5] In a recent Privy Council case [6] stirpital division is taken as the normal mode of division. It must also be conceded that equal right of enjoyment does not necessarily connote equality of interest. Under the

1. ***Alami*** v. *Konu* (1888) I. L. R. 12. Mad. 126. and ***Narayan*** v, ***Sirear*** 8 Tr. L. R. 92.
2. (1887) I. L. R. 10 Mad 362.
3. (1893) 4 M. L. J. 43.
4. S. A. 26 of 1082.
5. ***Lakshmi*** v. ***Kanaku Iswara Kesavan***, 2 Tr. L. R. 33 ; ***Adichan Velayudhan*** v. ***Ummayamma Pillai*** 16 Tr L. R. 11; ***Kanakku Kumaran*** v. ***Krishan*** 16 Tr. L. R. 79; ***and Lakshmi Narayani*** v. ***Eachooty Thakair*** 17 Tr. L. R. 69
6. ***Sulaiman*** v. ***Biyathumma*** (1916) 32 M. L. J. 137 (P.C.)

ordinary Hindu Law, for instance, though the shares of individual members may vary, before partition the enjoyment is according to needs and not according to interest. Before the decision *Munda Chetti* v. *Thimmaju Hengsu* [1], which put an end to suits for partition under Aliyasanthana system, the practice seems to have been to allot a life interest to males and females with possibility of issue extinct and to divide the property among the females. In *Narayani kutti Amma* v. *Achutankutti* [2] it is laid down that a partition cannot be set aside on the ground that the division is stirpital. In that very case, however, it will be noticed that a part of the property had been divided per capita and no objection was taken to it. Having regard to the state of authorities the only safe position that can be taken is that there is no definite rule either way and a division on either basis or a combination of both will not be set aside merely on that ground. [3].

10. It has been for a long time now established both in the Native States of Travancore and Cochin and in the British Courts that no member of a Marumakkathayam tarwad can claim division as a matter of right and every member can resist partition if he does not like it. In other words the unanimous vote of all the members is necessary to effect a partition. It seems to be doubtful whether the rule in its strict form is not really due to the British Courts. It is extremely unlikely that a single member should have been given the right against the will of the majority in the tarwad to resist a partition. Where there was a general consensus of opinion among members of the family that a division is expedient or beneficient, a division was generally allowed, notwithstanding the dissent of a small minority. Mr. Moore refers (see page 12) to a case decided in 1810, in which the individual share of a member of Marumakkathayam family was held liable to be sold for debts contracted by him. This

1. (1863) 1 M. H. C. R. 380.
2. (1918) I. L. R. 42 M. 292 : 36 M. L. J. 529,
3. A. S. 237 of 18.

necessarily presupposes the right in the purchaser to enforce partition. He refers also to an opinion given by Sudder Court Pandits in 1854 that where a junior member of a Nambudri family marries he may enforce a division of the family property. In all probability English Judges after the establishment of the British Courts conceiving that non division is the legal consequence of a system of law, "which vests the property in the females" rigidly enforced the rule of impartibility contrary to the common practice among the people. In *Munda Chetty* v. *Thimmaju* [1] which was a case under Aliyasanthana system Mr. Justice Holloway observed as follows: "It has not been disputed, as indeed it could not be, that the compulsory division of the family property is wholly opposed to the authorities on which the Aliyasanthana system of inheritance rests." The reference is to Bhutala Pandya's Kattu Kattalai whose authority has now been considerably shaken, and it has also no application to Malabar. He continues "It is equally opposed to the principle of that system which vests the property in females of the family. If this indisputable rule has been abrogated by the decision of the highest Court of Appeal upon the question distinctly raised before it, however much I should have lamented that Judges have over-stepped their proper duty of declaring law, I should as in the case of Hindu wills have followed them. Here, however, the decisions produced are those of inferior Courts influenced by their views of expediency in particular cases before them, and still more decisions in which while violating the law, those Courts have admitted their existence. Decisions dividing the family property have also been passed in Malabar. And it is one of the claims of our late colleague, Mr. Justice Strange, upon that respect which we all feel for him that he successfully resisted the attempts of the Lower Courts acting upon their views of expediency to introduce foreign admixtures into law, of which whatever may be thought of its policy, none can deny the consistency

1. (1863) 1 M. H. C. R. 380 at page 383.

with the theory upon which it is based." The above quotation indicates the spirit in which the law was laid down by the learned Judge. He took it that succession through females involves impartibility of the property and was resolved to prevent foreign admixtures into the system. It may be noted that in the case above referred to, both the District Munsif and the Sudder Amin who were probably gentlemen acquainted with the practice among the followers of the Aliyasanthana Law, had allowed division and on remand the Civil Judge observed that division of the family property had been allowed in numerous suits since the year 1825, and submitted those decrees for the information of the High Court. There could be no doubt, as admitted even by Holloway J, that divisions were equally common in Malabar. Again how can it be said that non-divisibility follows logically from succession through females? And even if it did, the question would still be not what would make the system logically perfect, but what were the usages among the communities who are governed by it? Before the British Courts, the Native Rajahs or the Local Panchayats used to decide all the disputes. It is extremely unlikely that they would have allowed a single factious member to insist on the tarwad remaining joint in opposition to the general will of the tarwad. And as a general rule, the majority of the members might enter into a family karar and lay down rules for the management of the family property. It looks like one of those cases where the beneficial growth of the customary law was arrested by the Courts that were not altogether well-informed as to the conditions of the society to which the law applied. The law of property amongst the followers of Marumakkathayam is based completely on usage and it would have been well if the British exponents of the law had allowed more weight to the views of the people than their own notions of a perfect system of Marumakkathayam Law which is nowhere expounded in writing. This is all the more to be regretted as experience is making it manifest every day

that compulsory non-division, by no means, helps the economical or social progress of the people. But it must be admitted, that so far as Malabar is concerned the law of impartibility has been laid down by the highest Court ever since 1814 [1] and this is the view upon which the Marumakkathayam people have acted ever since. Till recently, no one thought it even worth while raising the question. In *Arayal Prath Kunhi Poker* v. *Kantilath Ahmed Kutti Haji* [2] the rule is taken to be well settled. The course of decisions in Travancore and Cochin shows a similar variation, an earlier practice recognising compulsory partition (till 1874 in Travancore and 1871 in Cochin) and a later turn against partition betraying the strong Madras reaction due to the influence of Judges trained in British India. (See Dr. Pandalai p. 112). Recently an attempt was made to reagitate the question in a somewhat modified form as to whether the majority of the adult members or even the minority when it is in the interests of the family that there should be such a partition could not enforce partition but the finding on the issue remitted to the lower Court as to usage was against the contention and the finding was accepted by the High Court [3]. The law must thus be taken to be settled that there can be no partition unless all the members of the Tarwad consent.

11. But how is this rule to be applied when some of the members are minors ? On the one hand it has been laid down in *Arayalprath Kunhi Poker* v. *Kantilath Ahmed Kutti Haji* [2] that as a rule no partition will be binding when there are minors who are not in a position to give their consent and that it could bind them only in exceptional cases where it can be shown to have been entered into for considerations beneficial to the family as a whole including the minor mem-

1. A. S. 28 of 1814 ; 1 S. D. 118 *Ambu* v. *Raman Nambiyar* ; *Ravi Varma* v. *Valia Amma* S. A. 4 of 1857. *Sudder Decisions* : 1857 *p.* 120.

2. (1905) I. L. R. 29 M. 62.

3. *Veluthakkal Chirnaevi* v. *Veluthakal Tarwad Karnavan Kelappan Nair* 1916) 31 M. L. J. 679.

bers. This case has been followed in *Sarveshri Shettithi* v. *Puttamma Shettithi* [1]. In a proper case, in the interests of family peace and order a partition may be supported as a family arrangement [2] provided of course as in the case of all family arrangements the facts have been fully disclosed and the minors have been adequately represented. In this view, exceptional reasons must ordinarily exist to justify a partition because division for convenience of enjoyment would mostly satisfy the objects for which a partition is ordinarily entered into. But even that staunch supporter of impartibility Holloway, J. thought that unwieldiness owing to numerical increase was a good ground for partition [3]. A more liberal view has since been taken on this question [4]. In the case already referred to, Mr. Justice Sankaran Nair states the rule thus at page 881 [4]. "It is open to them (all the adult members) to divide the Tarwad properties among themselves ; such a partition would ordinarily be binding on the minors but if on attaining majority they were able to show that they have been prejudiced, partition could be re-opened so far as they are concerned and they would be awarded the share which should have been set apart for them but subject to this, the partition is final as between those who were parties to it." This view is accepted as sound by the Chief Justice and Spencer J. in *Narayani Kutti* v. *Achuthan Kutti Nair* [5] and more recently by the Chief Justice and Krishnan J. [6]. This is to put law concerning the Marumakkathayam and Aliyasanthana people on a footing similar to the ordinary Hindu families and need not be regretted, especially as it goes in some measure to redress an old grievance. The second branch of the rule as laid down by Mr. Justice Sankaran Nair and accepted by the later cases is difficult of

1. (1915) 29 I. C. 471.
2. *Parakkateri* v. *Koram*. (1912) M. W. N. 53 : 14 I. C. 295.
3. (1871) *Korapen Nair* v. *Chenan Nair* 6 M. H. C. R. 411.
4. *Veluthakkul Chirudevi* v. *Veluthakkal Tarwad Karnavan Kelappan Nair* (1916) 31 M. L. J. 879.
5. (1919) I. L. R. 42 M. 292 ; 36 M. L. J. 529. 6. A. S. 237 of 18.

application. How is the share to be determined ? As has been shown there is no rule laying down the definite share of each individual and partition depends entirely on mutual consent. Is it open to separate the intention to be divided from actual allotment of properties and to uphold the one while rejecting the other. ? The consent is to the partition as arranged and not to a divided status and to the particular arrangement if possible. To this extent perhaps the rule may be given effect to—that is to say, that if all the other members are agreeable to the divided status allowing the dissentient such extra share as the court thinks ought to have been allotted to him having regard not only to the considerations referred to above, but also to the way in which the other members similarly situated have been dealt with, the partition may be upheld making the necessary reallotment. That is, in fact, what is suggested in *Narayani Kutti* v. *Achyutan Kutti Nair* [1]. Where it is not possible to arrive at such fair share or where the other parties are not willing to an allotment at variance with the original arrangement, the result would be reversion to the original joint status. It has been held that a partition may be ratified by persons who are not in the first instance consenting parties thereto [2]. It is extremely doubtful if the term ratification is appropriate in this connection. There is grave reason to question the application of the doctrine of ratification to questions of status like marriage, adoption and partition [3] and the preferable way of putting it is that when there is an expression of concurrence by the remaining members, there is at that point of time, a complete partition.

12. The burden of proving that there has been a partition is, of course, on the persons setting it up. In *Korapen Nair* v. *Chenan Nair* [4] Mr. Justice Holloway said that where there

1. (1911) I. L. R. 42 M. 292 ; 36 M. L. J. 529.
2. *Kalyani Ammal* v. *Narayan Menon*, (1918) M. W. N. 38.
3. *Vasudeo* v. *Ramachandra*, (1876) I. L. R. 22 B. 551. *Sat raju* v. *Venkatasamy*, (1916) I. L. R. 40 Mad. 927 : 32 M. L. J. 119.
4. (1871) 6 M. H. C. R. 411.

are several houses bearing the same original Tarwad name but with an addition and there is no evidence of the passing of a member of one house to another, there is the strongest possible ground for concluding that a separation has taken place. In one case Mr. Wigram held that separation for two generations that is for sixty years was good presumptive evidence of partition. (A. S. No 15 of 1879. See Moore's Malabar Law page 19.) In A. S. No. 78 of 1878 (North Malabar) the Sub Judge held that forty years' separation was sufficient to raise an inference that there was a partition and his decree was affirmed by the High Court. The exact length of time necessary to raise the presumption is not a question of law. It is essentially a question of fact depending on the circumstances of each case and some assistance may be derived in this matter from analogous cases under the ordinary Hindu Law. But in using those cases it must be borne in mind, however, that division for convenience of enjoyment is not resorted to under the ordinary Hindu Law to the same extent as under the Marumakkathayam Law. In A. S. No. 18 of 1898 the tavazhis bore distinctive names and there was evidence of separate performance of ceremonies. They had also separate enjoyment for forty years. But as none of these circumstances was necessarily inconsistent with a state of non-division (their Lordships suggest that it might have been the result of an arrangement for maintenance) partition was not inferred. In *Nanu* v. *Puviyyil* [1] two families were living separately for 100 years. It was admitted that there was community of pollution between them which undoubtedly indicated common descent. The parties were unable to state who the common ancestor was or how long ago the separation took place. There was no resumption of joint living after the separation and each house managed its concerns without interference by any of the

1. (1911) 9 I. C. 849.

members of the other house. Each branch was in full enjoyment of different sets of properties as if each formed a separate tarwad and dealt with the properties without reference to the other. In these circumstances their Lordships (Benson and Sundara Aiyar, JJ.) held that the onus lay heavily on the plaintiffs to adduce satisfactory evidence that community of interest was maintained between the two houses at the date of the suit. "Mere lapse of time" their Lordships observe, "does not destroy community of interest but lapse of time without any apparent exercise of proprietary right is a very cogent circumstance against its continued existence, and the presumption against it must tell with increasing pressure according to the length of time that has elapsed." As against the circumstances referred to above, their Lordships declined to attach any weight to the fact that tali tying ceremonies more than once took place in the same house or to the fact that members of both the houses joined in the funerals of some of the members of the plaintiffs' family. As stated in *Sulaiman* v. *Biyathumma* [1] separate residence, separate assessment and separate management are the common indicia of partition. As provision for enjoyment without actual disruption of the family is very common and especially as partition is generally difficult when there are minors, ordinarily there would be a disinclination to hold in favour of an absolute partition. Provision for participation in management or insistence on joinder in contracting debts would be circumstances against partition. The same cannot however be said of prohibition of alienation or provision for each other's consent in the event of alienation ; for such provisions are usual even in ordinary partitions under the Hindu Law. Provision for alienation within the family would indicate disruption as the implication of such a clause is an independent power of disposition which is inconsistent with joint status. It

1. (1916) 32 M. L. J. 187. P. C.

need hardly be said that after partition the karnavan of the whole family can no longer represent the divided branches and any sale in execution without proper representation of the branches by their own karnavans would not bind them [1].

13. It sometimes happens that while some properties are divided, the rest are undivided. In most cases, the properties divided form the bulk of the family properties and the property left undivided is so left merely to maintain a quasi-stanom or to meet the expenses of the common family ceremonies and charities. But it sometimes happens that the property left undivided is very considerable and difficult questions arise for determination as to the status of the family and the rights *inter se* of the branches. These problems are not dissimilar to the problems arising in similar circumstances under the Hindu Law. There is no textual authority in the Marumakkathayam Law as there is in the Hindu Law *viz.*, " Once is a partition made " which has given rise to the presumption in favour of a complete partition in the absence of proof to the contrary. As such and having regard to the general prohibition of partition under the former system a presumption of that nature is possibly out of place. The following observations of Benson and Sundara Aiyar, JJ. in S. A. 1815 of 1911 adequately sum up the position. " His (respondent's) contention is that if the members of a family keep any of their properties undivided they may be regarded as undivided in status for all purposes of succession even if they have divided the rest of the common property. In other words the status of non-division continues for the determination of the questions of succession so long as any property remains undivided. The members of a family cannot, according to this argument, be divided in status with regard to some properties and undivided with regard to other properties. There are obvious difficulties in

1. *Kunhikannan* v. *Mannayatha Suppi* (1908) 18 M. L. J. 132 ; *Kunhappa Nambiar* v. *Shridevi* (1895) I. L. R. 18 Mad. 451.

accepting such a view. Take a Hindu family owning both an impartible zemindary and other partible property. It is the usual practice to divide the partible property leaving the zemindary to descend according to the rules of lineal primogeniture, depending on the principle of survivorship. Here is a clear instance where the status of non-division is partially dissolved and partially kept alive. Take again the case of Uraima or trusteeship of a temple vested in a number of tarwads which originally formed a single united family. It would be impossible to hold that all the tarwads must be regarded as joint when a question of succession arises with regard to the property of any of them or of a member of one of them. Mr. Ananthakrishna Aiyar urges that all properties that are divided should be regarded as gifted by the tarwad to those to whom they are allotted at the division and the status of union should be regarded as kept intact whenever there is any property left undivided. This would certainly not be in accordance with the intention of the parties and we can see no reason for ignoring the real nature of the transaction into which the parties enter. If the argument that there can be no partial dissolution of the status of union be well founded, it would be more reasonable to regard the family as completely dissolved when the major portion of the family estate has been divided but a small portion is kept as joint property for a particular purpose and allowed to descend as if the family were undivided. The succession to the undivided property would then rest in the eye of the law, on the basis of custom. This apparently is the view which regulates the succession to an uraima vested in several tarwads." Where there is substantially the intention to be divided the mere fact that some property is left undivided, would not make the family undivided in status even in respect of the property left undivided. Where the property divided bears an inconsiderable proportion to the family property [1]

1. *Raja Yarlagadda Mallikarjuna* v. *Durga Prasad*, (1900) I. L. R. 24 M. 147 (P. C.)

or where attempt is made to keep up a *nominal* unity of the family merely to enhance its dignity and whatever property is left undivided is ear-marked solely for that purpose, the status of the family is in substance a divided one. When property is inherited by several divided branches it is presumed that the property would be divisible at the instance of any of the branches though as between the individual members of the branches it may not be so divided without the consent of all [1]. Parties may however, by means of apt words keep themselves undivided in status in respect of any particular property. The undivided property will then be subject to all the incidents of joint family property. *Cf.* S. A. No. 1825 of 1918. The effect of such an express reservation may be that the family is for the purpose of inheritance still *undivided in status*. Under the Hindu Law this question is of comparatively little moment except in the case of impartible zemindaries and the rare case of competition between an undivided and a divided son in the matter of succession to the father's self acquisition. With respect to zemindaries the Privy Council have taken apparently diametrically opposite views. In *Raja Yarlagadda Mallikarjuna* v. *Durgaprasad* [2] their Lordships hold that where the other family property bears a small proportion to the impartible property, the family still remains undivided but in a later case *Tarakumari* v. *Chaturbhuja Narain Singh* [3] their Lordships take the view that the zemindari is not joint property and therefore where there is partition of all partible property there is a divided status. The former case is authority when the property undivided is family property proper and the latter case may be similarly taken as authority for the proposition that when there is no divisible property left the status of the family is a divided one. Whatever may be the

1. *Timma* v. *Narayanma* (1887) I. L. R. 10 Mad. 362 and *Amma* v. *Kouhunni Menon* 4 M.L.J. 43 and *Tarakumari* v. *Narayanasingh* 17 T.L.R. 69.

2. (1930) I. L. R. 24 M. 147 (P. C.) 3. (1915) I. L. R. 42 Cal. 1179.

view as regards the status of the family as a whole for other purposes, so far as the property in respect of which there has been partition is concerned the decision of the Privy Council in *Sivagnana* v. *Periasami* [1] would seem to suggest that the rule of lapse will not apply to such property and the ordinary rule of inheritance whatever that is, must apply.

14. Reference is made in Mr. G. Krishna Rao's Aliyasanthana Law to a case in which reunion was recognised among Aliyasanthana people (C. M. A. No. 311 of 1881). There is no case in British India under the Marumakkathayam Law in which the principle has been recognised. Under the Hindu Law reunion takes place only among parties to the Original division subject in addition to their being within the limited circle of relations recognised by the texts. There can be no reunion with a person who is a minor. [2] Though according to the rulings of the Madras High Court [3] the status of a re-united family is in all respects similar to that of an undivided family, on the texts, it is far from clear that it is so. In the absence of proof of usage re-union does not seem to be a matter on which the analogies of Hindu Law can be confidently appealed to. From one point of view no doubt conditions are more favourable for the recognition of such a status in the Marumakkathayam and Aliyasanthana systems. Whereas under the Hindu Law, adoption is only possible under very stringent conditions, under these systems adoption may take place without any restriction as to sex, relation or age. But it is possible to make too much of this argument for adoption confers rights on the persons adopted to the property of the adopter but not *vice versa*. In Travancore, we have a large body of authority in favour of re-union though as pointed out by Dr. Pandalai in his treatise on Marumakkathayam Law only in one case re-union was successfully set

1. (1878) I. L. R 1 Mad. 312

2. *Balabux* v. *Rukmabai* (1903) I. L. R. 30 C. 725 (P. C.)

3. *See Krishtaraya* v. *Venkatramayya*, (1903) 19 M. L. J. 723.

up. In *Kumara Narayana* v. *Narayanasankara* [1] the Travancore High Court observed that although there are no express decisions bearing on the question of re-union among Marumakkathayam people, there was no practical objection to its recognition among them. In A. S. 265 of 1088 it was further said that there was no difference between the Hindu Law and the Marumakkathayam Law as to the essential requisites necessary to constitute re-union. But in *Raman Neelakantan* v. *Parvati Narayani* [2] while one Judge Mr. Muthunayakan Pillai held that the validity of reunion has been judicially recognised, the other Judge Mr. Ramachandra Rao would not express any definite opinion as to whether re-union is valid according to Malabar Law and if valid whether there were not any limitations to the rule. Both the judges agreed, however, that the mere fact that some members of a branch, have re-united with another branch would not entitle the remaining members to lay claim to the property of that branch. The confusion for purposes of inheritance that would result from a recognition of such reunions as for instance, of some members of a branch in a state of re-union with one branch as regards certain properties, with another in respect of other properties would be indescribable. This should make the courts hesitate to accept the principle of re-union as applicable to Marumakkathayam and Aliyasanthana people without clear proof of usage in favour of it. It must however be conceded that there are similar difficulties as to inheritance in the case of adoption.

15. If the rule is applicable to these people it is a matter for consideration whether restrictions similar to those under the Mitakshara may not have to be recognised. Otherwise Tavazhis that were never undivided within human memory may unite together and form an undivided tarwad. So far the only rule that is clear is that persons who are

1. S. A. 3 of 1083. 2. A. S 76 of 1086.

not descended from a common ancestor, who belong to different tarwads and who have no attaladakkam rights whatever cannot unite so as to form a single tarwad with the rights and disabilities attaching to such a combination. In such a case the position would exactly be the same as if individuals governed by the Mitakshara law belonging to different families tried to form a joint Hindu family by living together. Such a combination would be similar to partnership and the members would be at liberty to put an end to it at any time they please. In a case from North Malabar (S. A. 1372 of 1897) it was contended that the children of a Nayar by different consorts belonging to different tarwads were living together as one tarwad and, as such the rights and disabilities of the position of undivided members of a tarwad would attach to them. The Court (Davies and Benson, JJ.) sent down for trial an issue whether there was any usage allowing the formation of a tarwad in this manner. The point was not ultimately decided by the Court as the parties compromised the dispute after remand. There is no doubt that descent from a common female ancestor at least is essential to the constitution of a tarwad. The combination of individuals unconnected by any such relationship would be absolutely illegal and unwarranted by any usage. Once reunion takes place, the position of affairs thereafter would be exactly as if there was no partition at all in the first instance. If re-union is legally possible under these systems, it might be legitimate to infer an intention to reunite when parties who were previously divided put their properties together and live in commensality unless there is clear evidence that they intended to continue as tenants-in-common. But, as has been held by the Travancore High Court [1] in the case of parties who have separated, the mere fact that they have joined together in a few documents, in the absence of evidence of joint residence, joint enjoyment

1. *Krishna* v. *Sankara* (A. S. No. 265 of 1058)

of property and submission to the authority of one karnavan, is not sufficient proof of an intention to reunite. After re-union there cannot of course be partition again without the consent of all the members.

16. Here, it may be convenient to consider the effect of loss of caste. Under the Hindu Law loss of caste involved forfeiture of rights in the family property. This is the law even now in Travancore as laid down by a Full Bench [1]. The learned Judges say "It is undoubted that as well under the Hindu Law as under the archaic system of that law prevailing in Malabar and Travancore, degradation from caste which accompanies conversion to Christianity or Mahomedanism entailed a forfeiture of a man's civil status and deprived him of the capacity to inherit. The convert is no longer regarded as a member of or co-parcener of the family to which he originally belonged and his conversion operates to dissolve as far as he is concerned, the tie which bound the family together." This undoubtedly must have been the law also in Malabar. But the Caste Disabilities Act has changed the situation entirely. A junior member would no longer forfeit his right by reason of his changing caste. But even so, the change of caste may affect him in many ways. His right to be maintained out of the family funds cannot be affected. If the family finds it impossible to feed him at the family residence owing to the social degradation it might involve, they are bound to give him separate maintenance. His separate residence would be due to no fault of his but entirely due to the prejudices of the family. It is out of the question also that a person who has lost caste should occupy the office of Karnavan and discharge the secular and religious duties appertaining to that position. Where the excommunication is due to any caste offence involving moral turpitude, the reason for his exclusion from the karnavanship would be all the stronger, But none of these circumstances

1. *Selina Lydia* v. *Govindan Ayyappan* 4 Tr. L. R. 12.

would justify his being denied his right to be maintained. If the person excommunicated is a female and has children subsequently outside caste, those children would not be members of the co-parcenary and there is nothing in the Caste Disabilities Act to confer rights on them [1] nor could such outcastes claim the benefits of family trusts which were intended only for the benefit of such as were in caste [2]. If the loss of caste is due to change of religion which does not permit of retention of Marumakkathayam law such as Christianity somewhat different considerations would arise. On the principle of *Abraham* v. *Abraham* [3] and *Tellis* v. *Saldanha* [4] there would be severance of their joint interest. [5] This will not disrupt the family as between other members who are in caste and who have not changed religion. The person who has changed religion will cease to be a joint owner with the incidents of Marumakkathayam joint ownership and become an ordinary joint owner an incident of which right is the right to partition. When the old theory that the interest of an individual member in a Marumakkathayam family consisted merely of "rights out of property and not in property" prevailed it might no doubt have been argued that this result did not follow. The theory now prevalent being that all are joint owners, the effect of conversion is to release the interest of the convert from the trammels imposed on it by the Marumakkathayam Law, in other words, he becomes a tenant-in-common. How his share is to be ascertained is in the present state of authorities, a question of great difficulty. But the difficulty of the situation is no ground for not recognising the result. It would be for the court to arrive at a conclusion as to what would be a fair share

1. *Cf. Vaithilinga* v. *Ayyathorai*, (1917)I. L. R. 40 Mad. 1118.
2. *Venkatachalapathi* v. *Subbarayudu* (1898) I. L. R. 13 M. 293 at 306.
3. (1863) 9 M, I. A. 195.
4. (1886) I. L. R. 10 M. 69.
5. *Kunhichekkan* v. *Lydia Aruccandan* (1912) 14 I. C.480 : (1912) M. W. N. 386.

allottable to him at the partition. This view has not commended itself to a Full Bench of the Madras High Court [1] which has dissented from the view taken in *Kunhi* v. *Lydia* [2] The Full Bench case was a case in which a single member became convert. If the whole family became converts, then the principle of *Abraham* v. *Abraham*[3] would apply in terms and the Malabar Tarwad as such will cease to exist and instead there will be only a group of ordinary tenants in common.

1. *Pathuma* v. *Raman Nambiar* (1921) I. L. R. 44 M. 891 : 41 M. L. J. 243.
2. (1912) M. W. N. 386 : 14 I. C. 480. 3. (1863) 9 M. I. A. 195.

(Overruled)

CHAPTER III.

ADOPTION.

17. Adoption—No religious motive—No ceremony—Who can adopt—Consent of all—Leprosy, Insanity. 18. Who can be adopted no restriction as to age, sex or number—Bali or Vamsom—Seemai people 19. Effect of adoption—Rights in the natural family—Rights in the adopted family.

AS under the Hindu Law, adoption is a recognised means of recruiting the family under the Marumakkathayam and Aliyasanthana systems of Law. It seems, however, to be based entirely on secular motives and is akin to the Kritrima form of adoption which is in force in the Mithila country. [1] *Pathukayyal dathu* or adoption by ten hands (*i.e.*, those of the senior male and female of the adopting tarwad, the senior male and female of the natural family and of the person adopted) into which religious motives might enter is obsolete. Even among Brahmins there does not seem to be any special form of ceremony connected with adoption [2]. The only ceremony sworn to as required in a case of Marumakkathayam Brahmins was a Ganapathi Homam as to which too, opinion was not uniform [3]. There cannot be adoption to a branch alone [4]. Adoption can only take place with the consent of all the members of the family. That would seem to be the effect of the decision in *Raman Menon* v. *Raman Menon* [5] though the Privy Council refers only to consultation. Some evidence was given to the effect that when the member who is not consulted is an outcaste or an insane person, adoption can take place without his consent, but the reasoning on which the case proceeds as well as the ratio of the decision

1. *Secretary of State* v. *Santaraja* (1913) 25 M. L. J. 411 at 422 ; *Velayudhan Eswaran* v. *Ramasami Iyer*, (1890) 7 Tr. L. R. 66.
2. *Vasudevan* v. *Secretary of State* (1887) 1. L. R. 11 Mad. 157.
3. *Subramanyan* v. *Parameswaran* (1887) I. L. R. 11 Mad. 116.
4. *Valiappu Nair* v. *Paru Nethiar* (1899) 9 M. L. J. 196.
5. (1900) I. L R. 24 Mad. 73 : 10 M. L. J 245. (P. C.)

in *Chandu* v. *Subba* [1] would seem to be opposed to it. In the last case, it was held that leprosy was no disqualification for inheritance under the Aliyasanthana Law and as such the consent of the leper was essential to validate the adoption. It was held in that case that the disqualification of lepers from inheriting under the Hindu Law rested on special conventional grounds which had no application to the Aliyasanthana system. Inheritance is not dependent in that system on the capacity to offer funeral oblations. Insanity is equally not a disqualification, [2] and must stand on the same footing. If the duty of the karnavan is only to consult and if he had a reserve of power to over-rule wrong-headed opposition it might be, incapacity to respond as in the case of an insane person might justify adoption by the karnavan without reference to such incapacitated persons. Such a power is however nowhere recognised; on the other hand right to bar an adoption is stated to be an ordinary incident attaching to the status of every member. [3] Nor is there any moral obligation to adopt recognised by the usages of the country, at any rate, so long as there is more than one member in the family. [4] Marumakkathayam Law does not differ on this point from Aliyasanthana Law.

18. There is no restriction as to the age, number or sex of the persons to be adopted. Adult adoption has been recognised in *Subramanyan* v. *Parameswaran* [5]. Adoption has been upheld of two females and a male [6], of a single female[7], of one male and one female [8], and of one male alone [9].

1. (1889) I. L. R. 13 Mad. 209.
2. *Sanku* v. *Putlamma* (1890) I. L. R. 14 Mad. 289.
3. *Chandu* v. *Subba* (1889) I. L. R. 13 Mad. 209.
4. *Per Davies J. in Payyath Nanu Menon* v. *Thirumthipalli Raman Menon* (1896) I. L. R. 20 Mad. 51 : 6 M. L. J. 241.
5. (1887) I. L. R. 11 Mad. 116. 6. See Moore's Malabar Law p. 33.
7. A. S. No. 21 of 1814 Prov. Court of Western Division.
8. S A. No. 19 of 1874.
9. *Subramanyan* v. *Parameswaran* (1887) I. L. R. 11 M. 116; *Secretary of State* v. *Santaraja* (1913) 25 M. L. J. 411.

It is sometimes said that the person or persons adopted should be of the same Vamsom or tribe or Bali (Aliyasanthana Law) as the adopter. But this rule seems to be only directory and not obligatory [1] This rule was assumed to be an obligatory one in *Payyath Nanu Menon* v. *Thiruthipalli Raman Menon* [2] by Subramania Aiyar, J. but in that very case, one of the adoptees could not have belonged to the same vamsom as the adopter, being children of the latter. In A. S. No. 21 of 1814 already cited there were others more nearly related than the person adopted. In A. S. No. 75 of 1872 it was held by the Sub-Judge that in the case of adoption of strangers, the adoption must be before the marriage of the girl, though her mother also might be adopted at the same time. Mr. Moore doubts the correctness of the last ruling. Bhutala Pandia's ordinance relating to adoption runs in these terms :—"If on failure of heirs a female of the same Bali is brought up, that will amount to an adoption. There shall be no adoption of a male. In families that have special *mana mariade* (honors) which descends to the family, no sale shall be made nor shall property be given to wife and children on the plea that there are no heirs. If the family becomes extinct without adoption, the heads of the families in the order of 4,8 and 16 shall choose a girl and a boy of another family of the same Bali as representatives of that family and these representatives alone shall be the heirs and not the wife and children of the deceased". To the extent that the rule insists upon the adoption of a male and female of the same Bali in the case of special families it was found not to be in accordance with usage in *Secretary of State* v. *Santaraja* [3]. The right of the people of the seema (or province) to nominate an heir to the family on the extinction of the family was recognised by the Sudder Adalut in A. S. No. 68 of

1. A. S. No. 75 of 1872, Sub-Judge of North Malabar ; *Secretary of State* v. *Santaraja* (1913) 25 M. L. J. 411.

2. (1896) I. L. R. 20 Mad. 51 : 6 M. L. J. 241.

3. (1913) 25 M. L. J. 411

1855. But that was a case of Pattam or Chieftainship to which certain properties and dignities appertained. It might be questionable whether a right of that sort to appoint to the private properties of the family in derogation of the rights of the Crown would be recognised.

19. On adoption, the adoptee acquires all the rights of the natural born members of the tarwad, so much so that if the adopter is a female, she immediately loses her right of management in favour of the male adoptee. The seniority would depend on the age of each member and not on the date of adoption [1]. As to whether as a rule the persons adopted lose their rights in their natural family or only gain rights in the family into which they are adopted without losing any of those rights has not yet been finally decided. In *Avdale alias Shekhara Pisharodi* v. *Secretary of State* [2] a case relating to Pisharodis, it was contended that the latter was the effect but their Lordships held that such a custom was not made out. In S.A. No. 1585 of 1894, the District Judge of South Canara sent down an issue to be tried by the Court of the first instance whether according to the rule of law and custom in Aliyasanthana families if a woman is adopted she retains her old rights or loses them. The Sub Judge Mr. Chandu Menon found that the evidence adduced by the plaintiff to show that women of the caste of the parties adopted into other families did not lose their rights in their natural families was good so far as it went but was insufficient to establish a custom. He found however that the conduct of the parties and the documentary evidence showed that in that particular case, the adoption did not sever the status and that as understood by all the parties from the beginning the adoption conferred on her a status in the new family in addition to that which she had at the time and not in supersession of it. In second appeal in giving effect to this conclusion their Lordships (Best and Subra-

1. (1890) *Kunji Kotha* v. *Aiyappan Krishnan* 9 Tr. L. R. 100.
2. (1893) 3 M. L. J, 242.

mania Aiyar, JJ.) repel the argument of the appellant so far as it rested on the analogy of the Hindu Law by referring to *Chandu* v. *Subha* [1] and observing that even under that law there is the Kritrima form of adoption in which the adopter retains his original status to which they liken the adoption in question. In Travancore the question was considered in *Velayudhan Eswaran* v. *Ramaswami Aiyar* [2] by a Full Bench of the Travancore High Court. They hold that where one or more only of the tarwad and not the entire family is adopted, the adoptees forfeit their rights in their natural family in the absence of special reservation to the contrary but if the adoption be of an entire family, the adoptees retain their full rights in their old family while acquiring new rights in the adopter's tarwad. The properties of the adoptees in each tarwad should be viewed as separate or self-acquired property so far as the other tarwad is concerned. There is nothing in the Malabar Law to prohibit the adoption of several generations at the same time [3]. A Travancore case holds that the persons adopted are bound by all the liabilities incurred by the members of the tarwad before their adoption whether the properties are charged or not [4]. Where persons are adopted into a new family without losing their rights in the old, what is to become of their self-acquisition there is no means of saying without an inquiry into usage, but *prima facie*, it should go to the natural relations in preference to the adopted ones but in default of natural relations, there is no reason why it should not go to the latter.

1. (1889) I. L. R. 13. Mad 209. 2. (1890) 7 Tr. L, R. 66.
3. (1890) *Kunja Kotha* v. *Aiyappan Krishnan* 9 Tr. L, R. 100.
4. (1892) *Kanakku Mathevan Krishnan* v. *Perumal Pillai Lekshmi Pillai Tangachy* 11 Tr. L. R, 28.

CHAPTER IV.

THE KARNAVAN.

20. Karnavan—Eldest male—Female in some families or when no male—Aliyasantana Law. 21. Position of the Karnavan—Acts—Validity of—Test Ratification, limits of, 22. Two capacities, spiritual and temporal—Summary of decisions as to rights and duties. 23. Burden of proof—Necessity—Implied assent. 24. Inquiry—Extent of—Ex-parte decree—how far protection. 25, Necessity—Items of—Defence in Criminal Cases 26. Acts of management and alienation—Difference between—Movables—Power of Disposal over 27 Compulsory duties and discretionary power—Distinction. 28. Fallacies—Rights of Karnavan and junior members.

EVERY senior member of a tarwad is a karnavan to his Anandravan but it is not in this sense that the term is used when dealing with questions of Malabar Law. It denotes the manager of a Marumakkathayam family. Ordinarily it is the eldest male member of the family that is the Karnavan, though in some families, for instance, in the Kovilagoms in the Zamorin's family the eldest female manages. Usage does not preclude a female from managing the affairs of a tarwad when there is no male member in the family capable of managing [1]. But as soon as there is one such she will vacate the position. In S. A No. 346 of 1878 the point was raised whether it is the eldest female or the mother of the senior-most male that should in those circumstances manage. Mr. Wigram was of opinion that the senior-most female should manage while the Sub-Judge was of opinion that the mother of the senior-most male should. The High Court expressed no opinion on the point. The lady manages in her own right as owner and not as the guardian of her son. The

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1. *Subramanian v. Gopala* (1886) I. L. R. 10 Mad. 223 ; S. A. 2599 to 2601 of 1914 ; *Aiyappan Keshavan v. K. N. Govindan* 21 Tr. L. R. 174 ; *Lakshmi Narayani v. K. P. Parameswaran* 22 Tr. L. R. 183.

opinion of Mr. Wigram seems obviously right. When managing there is no reason to suppose that her powers would be less than those of a male karnavan [1]. Under the Aliyasanthana system there was long the notion prevalent that the ladies alone were entitled to manage. In *Devu* v *Deyi* [2] it was held that the point was by no means clear whether the eldest who was a male or the eldest female was entitled to manage but in the evidence it appeared that males did often manage ; in fact in all the transactions with the Government it was only males that acted for a long time. Whatever doubts there might be as to the management when the competition is between the eldest male and the eldest female it was stated in *Mahalinga* v. *Mariyamma* [3] that there was no doubt that the senior-most member when a female was entitled to manage. The view that now prevails is that the senior-most member whether a male or a female is entitled to manage. There are some families however in which management is by custom in males and one such case is A. S. No. 55 of 1901.

21. The position of the Karnavan is accurately expressed by saying that it is the same as that of the manager of a Hindu Mitakshara family with such modifications as the rule of impartibility necessarily imposes. Like the manager of a Hindu family, his acts to be binding on the family must be those of a prudent manager acting *bona fide* in the interests of the tarwad. But an alienation or an encumbrance created by him which is not binding on the family is altogether void whereas in the case of the manager of a Mitakshara family it would be binding on his own share. Again, exceptional cases apart, however beneficial or necessary an act done by the junior members may be it would be absolutely void as against the tarwad if the karnavan is not a party thereto and

1. *Subramanian v. Gopala* (1886) I.L R 10 Mad. 223 ; *Lakshmi Narayan* v. *K. P. Parameswaren* 22 Tr. L. R 185.

2. (1885) I. L. R. 8 Mad. 353.

3. (1889) I. L. R. 12 Mad. 462.

that even though all the other members may take part in it. The right of management is his birthright and cannot be affected by the acts of the junior members. The same is the rule in the case of an ordinary Hindu family governed by the Mitakshara Law ; the senior member alone has the right to manage : no one else, not even all the members put together have the right to represent the family in transactions with strangers. But since the Courts have recognised the right of a co-parcener in a Mitakshara family to deal in any manner he chooses with his own share for valuable consideration, the alienation will operate upon the share of the alienor. An alienee can enforce the alienor's equity to a partition of the property alienated. As the individual has no share in a Marumakkathayam tarwad any alienation or encumbrance made by persons other than the manager is absolutely void. It would be equally void even where it is the act of the manager unless it is one which a prudent man acting in his own interests would be justified in entering into or the alienee acted *bonafide* in the belief that the alienation is beneficial to the family. The alienation may however be ratified by the other members as in the case of alienations by members of an ordinary joint family. In *Kandasami* v. *Somaskanda* [2] it was held by Benson and Krishnaswamy Iyer JJ. that an alienation by the managing member of a Hindu family cannot subsequently be ratified by the other members in the family as the principle of ratification can apply only when a person purports to act without authority on behalf of another. According to their Lordships, an alienation with the consent of all the members will be binding but no amount of subsequent consent can validate an alienation which is not supported by necessity. This case does not take sufficient note of the position of the managing member as a co-owner whose alienations are held to be ratifiable by the other co-owners under the

1. *Puthisseri Maniyanoor Puthamvittil Narayana Nair* v. *Thozhukkat Pullaniyil Narayana Nambiar* (1916) 32 M. L. J. 489.

2. (1910) I. L. R. 35 Mad. 177 : 20 M. L. J. 371 : (1910) M. W. N. 580.

English law, whether independently of or as an exception to the general rule as to ratification. Ratification perhaps is not the proper word; affirmation might be better. The Privy Council has held that alienations by individual members are only voidable and not absolutely void and there is no reason why this rule should not apply to alienations by managers [1]. In *Kalliani Ammal* v. *Narayana Menon* [2] Wallis, C. J. and Seshagiri Aiyar, J. held that a partition—a much stronger case—may be ratified by persons who were not originally parties thereto. In *Kattaprath Thayyil Mammad* v. *Purayil Mammad* [3] where the Karnavan of a Tavazhi made certain alienations which the junior members took no steps to question during their life-time, their Lordships Abdur Rahim and Oldfield, JJ. held that it was not open to the attaladakam heirs who succeeded to the property on the death of the last surviving member of the tavazhi to question it. This is going too far. The judgment proceeds upon the now exploded theory that individual members have no rights in the property but only rights out of it. Even so, it is difficult to see how the conclusion follows. The property vests in the corporation, the family; the right to avoid belongs to the family and when the family becomes extinct, why should not the right descend to the successors of the Tarwad? In fact, there is no reason at all why any distinction should be made between an ordinary Hindu family and a Malabar family in respect of this matter. The Law applicable to a Mitakshara joint family in Bengal presents the nearest analogy and the decisions thereunder may be usefully referred to in this connection. There, as here, alienation by the managing member for a purpose not binding on the family is wholly void and does not bind even his share. When there is a ratification by all the members in existence, the alienation is held to be valid and any subsequently born member

1. *Hanuman Kamat* v. *Hanuman Mandur* (1891) I. L. R. 19 C. 123. (P.C)
2. (1918) M. W. N. 38: 45 I C. 578.
3. (1920) 44 M. 149: 39 M. L. J. 702.

cannot question the alienation; but, if before the consent of all the members is procured another member is born, he is held, equally with others, to be entitled to question the alienation and in the absence of his assent, the alienation cannot be upheld. Let us take two other cases. Suppose the karnavan purports to alienate family property as his own and in denial of the family right though for debts demonstrably incurred for a family purpose. Would the alienation bind the family ? It would not, because he does not act on behalf of or purport to bind the family. Such an alienation would be absolutely void and incapable of ratification [1]. A different view is however taken in *Subramania Pattar* v. *Krishna Embrandiri* [2]. *Balwant Singh* v. *Clancy* [1] is not adverted to therein. S. 8 of the Transfer of Property Act on which reliance is placed contains the saving clause " unless a different intention is expressly or necessarily implied." If an adverse title is not clearly set up or an alternative intention to act on behalf of the family is not clearly excluded the general presumption raised by the section will apply [3] and the alienation may also be capable of being affirmed on the principle above indicated. Even in cases where an adverse title has been set up a charge may be given to the alienee when the family seeks to recover the property to the extent of the incumbrances discharged. [4] In *Kunhanna Shetty* v. *Timmaju* [5] which gave to the alienee a charge to the extent of consideration found binding no argument was founded on *Balwant* v. *Clancy* [1] Next suppose a junior member alienates the family property for a family purpose. On behalf of the family the karnavan must be able to ratify it. In S. A. 1469 of 1918 a junior member was managing the property with the consent of the karnavan and his alienation for family purposes

1. *Balwant Singh* v. *Clancy* (1912) I. L. R. 34 All. 296 : 23 M. L. J. 18.
2. (1920) 39 M. L. J 590 : 60 I C. 77 : 12 L. W. 361.
3. *Bijraj Neopani* v. *Pura Sundary Dasee* (1914) 42 C. 56 (P. C.)
4. *Ammani Ammal* v. *Ramasami Naidu* (1918) 37 M. L. J. 113.
5. (1914) 27 M. L. J. 60 : 24 I. C. 246.

was held to be capable of being ratified by the family. If the debt was not in the first instance incurred for family purposes it would be beyond the power of the karnavan to adopt it so as to bind the family. If the junior member acted in denial of the family right, then also it would be beyond the power of the karnavan alone to affirm the transaction. He is the representative of the family and can ratify only what is done on behalf of the family. The right to affirm an invalid alienation is that of the individual members as co-owners which can be exercised by each individual member on his own behalf only. Where the capacity in which the junior member effected the alienation is unknown the subsequent adoption may well be taken as indicating that the earlier act was either authorised or was done on behalf of the family. Where a debt is incurred by a junior member for a family purpose but not on behalf of the family, even a ratification by all the members cannot make them liable for the debt to the creditor without a novation. It is doubtful if the managing member could make the family liable for it to the creditor unless the junior member in question had a right of recourse in respect of the debt against the family as in the case of maintenance charges, etc.

22. The karnavan has two capacities, a temporal and a spiritual one. In the former, he is the manager of the family properties, maintains the junior members, represents the tarwad in transactions with strangers, etc. In the latter capacity, he presides at the religious ceremonies and performs all the religious duties which are incumbent on the tarwad, [1] a portion of these latter duties clings to him even when he vacates his position as karnavan. [2] The following is the summary of the decisions on the rights and duties of a karnavan. He is the guardian of the minor members of the

1. *Krishnan* v. *Raman* (1915) I. L. R. 39 Mad. 918.

2. *Kenath Puthen Vittil Thavazhi* v. *Narayanan* (1904) I. L. R. 28 Mad 182 at 190.

family [1] and to him the other members look for protection, education and maintenance [2]. No guardian can be appointed in respect of the individual interests of members of the family as the interest is not individual property [3]. The Karnavan is not bound to give English education [4] though it is not improper for him to do so [5]. In him is vested the right and the duty to manage the family properties. He cannot sue for maintenance so long as he is not validly superseded [6]. So far as his powers are not expressly taken away by a karar they remain [7]. Even where a property is recovered from an alienee by a junior member after setting aside an alienation by the karnavan the latter has a right to obtain possession of it from that junior member [8]. He is the person to take care of the family property and to invest it, in his own name, in kanom or other security or in purchasing lands. He is not ordinarily required to furnish security under O. 32, R. 7 of the C. P. Code for the amount he draws from court [9]. He is entitled to administer the family charities and fill the office of Uralan when the family is entitled thereto. The family patta or jenmam registry would stand in his name and he is entitled in his own name to sue for the recovery of the family property and take other steps necessary for its protection. He may acknowledge debts but cannot revive barred ones [10] for his

1. *Thathu Bapuity* v. *Chakayoth Chathu* (1873) 7 M. H. C. R. 179; *Ukkandam Nair* v. *Unikumaran Nair*, 6 M. L. J. 139, 140.

2. *Kalliani Amma* v. *Govinda Menon*; (1911) I L. R. 35 Mad. 648.

3. *Krishnan* v. *Govinda Menon* (1898) 8 M. L. J. 294.

4. *Lakshmi* v. *Marudevi* (1908) I L. R. 32 M. 139.

5. *Neelakanta Thurnvambu* v. *Anantanarayana Aiyar*, (1909) 19 M. L. J. 0.

6. *Nambiamuttil Pokker* v. *Kithakki Kunhipatumma* (1905) I. L. R. 29 Mad. 296.

7. *Karunakara Menon* v. *Kuttikrishna Menon* (1916) 5 L. W. 511; *Krishnan* v. *Raman* (1915) I. L. R. 39 Mad. 918; S. A. 993 of 17.

8. *Ramakurup* v. *Sekhara Kurup*, (1910) 21 M. L. J. 87.

9. *Konthi Menon* v. *Unneri Nambiar* 10 M. L. T. 190; (1911) 12 I. C. 77.

10. *Mankootil Chathukutti Nair* v. *Komappan Nair* (1917) 35 M. L. J. 380; S. A. 1065 of 1889.

position is more akin to that of manager of an ordinary Hindu family than that of the father [1] and the pious obligation which forms the foundation of the contrary rule in the case of the Hindu son is lacking in the case of the Malabar Anandravan. Of course it is quite another question if the karnavan would be held liable to refund the amount to the family if he makes payment to the creditor. He may enter into a *bona fide* compromise in respect of doubtful rights of the family [2]. In *Karakkattitathil Rayarappan Nambiar* v. *Koyotan Chalile Veetil Kamaran* [3] it is stated that the burden is on the family to show the existence of invalidating circumstances. A different view has been taken in the case of Hindu widows and it is difficult to distinguish the two cases. In *Kunhunni alias Ravivarma Rajah* v. *Ramasubramania Pattar* [4] both *bona fides* and necessity are stated to be the conditions of a valid compromise and it is also stated that the burden is on the party claiming the benefit of such a compromise. The decree in a suit in which he sues or is sued in his representative capacity and which he conducts with due regard to what he honestly considers is in the best interests of the family is binding against the tarwad [5]. In all the dealings of the family he alone can represent the family. In him is vested the entire executive authority of the family so much so that any restriction on his powers in these matters will not be given effect to against a stranger without notice [6]. He is entitled to the possession of family properties

1. *Govindan Nair* v. *Narayanan Nair* (1912) 23 M. L. J. 706 ; *Kunhi Thekkan* v. *Lydia Aruccandan* (1912) M. W. N. 386.

2. *Moidin Kutti* v. *Beevi Kutti Ummah* (1894) I. L. R. 18 Mad. 3 ; *Rayarappan Nambiar* v. *Kamaran* (1918) 35 M. L. J. 51 ; *Krishnan* v. *Kannan Padmanabhan* (1898) 15 Tr. L. R. 144 ; 5 Tr. L. J. 336.

3. (1918) 35 M. L. J. 51.

4. (1916) 31 M. L. J. 733.

5. *Vasudevan* v. *Sankaran* (1897) I. L. R. 20 Mad. 129.

6. *Kanna Pisharodi* v. *Kombi Achen* (1885) I. L. R. 8 M. 383.

as against an anandravan [1]. His possession is of such a superior character to that of the other members that it can be protected as against them under S. 145 of the Criminal Procedure Code [2]. He can create debts, when necessary pledging the family credit. He can give family lands on *verumpattam* (yearly lease) or other leases for a term of five years and where local usage permits for even longer terms [3]. He can singly create kanoms or ottis [4] but so far as permanent alienations are concerned he can effect them only with the consent express or implied of his Anandravans [5] though the wrong-headed opposition of individual members will be disregarded [6]. He cannot grant a permanent lease [7] nor a kanom for sixty years [8]—of course in the absence of necessity or clear benefit. Such an alienation cannot be upheld even to the extent he can make a valid grant. He can grant a permanent lease with the consent of all the adult Anandravans [9]. He is the person who has to take in adoption when adoption has been settled upon by the family [10]. Subject to the duty of maintaining the family, he has very large discretion in the disposition of the family income. He has considerable discretion in determining what charities and what religious ceremonies are to be performed in the family and when [11]. His power of investment may

1. *Kannan* v. *Tenju* (1882) I. L. R. 5 Mad. 1 ; *Kalliani Amma* v. *Govinda Menon* (1911) I. L. R. 35 Mad 648 : 22 M. L. J 23.

2. *Bhaskari Kasavarayudu* v. *Bhaskaram Chalapatirayudu* (1908) I.L.R. 31 Mad. 318 : 18 M. L. J. 343.

3. *P. P. Kunhamod Hajee* v. *P. P. Kuttiath Hajee* (1881) I. L. R. 3 Mad. 169, 174.

4. *Edathil Itti* v. *Kopzshon Nair* (1863) 1 M. H. C R. 122 ; *Vasudevan* v. *Sankaran* (1897) I. L. R. 20 M. 129 : 7 M. L. J. 102 (F.B.)

5. *Kondi Menon* v. *Sranginreagatta Ahammada* (1862) 1 M. H. C. R. 248, *Kapireta Ramen v Makkaiyil Mutoren* (1863) 1 M. H. C. 359 : *Raman Menon* v. *Raman Menon* (1899) I. L. R. 24 M. 73 : 10 M. L. J. 245. (P. C.)

6. *Kalliani* v. *Narayana* (1885) I. L. R. 9 Mad, 266.

7. *Ramunni* v. *Kerala Varma* (1891) I. L. R. 15 Mad. 166.

8. *Kalliani Amma* v. *Govinda Menon* (1911) I. L. 35 Mad. 648 : 22 M. L. J. 23.

9. S. A. 578 of 1920.

10. *Raman Menon* v. *Raman Menon* (1900) I. L. R. 24 M. 73 : 10 M. L. J. 245. (P. C.)

11. S. A. 117 of 1880.

include power to invest money in trade not being of a highly speculative character. It is doubtful if it would be open to the karnavan to give himself the power to borrow which he does not otherwise possess by starting a trade. If there are objections to recognising the power in the case of the manager under the Hindu family, all those objections apply with greater force to the case of the karnavan. It has been held accordingly that it is not within the power of the karnavan to start a trade. He may do so if all the adult members consent [1]. Even then one should doubt if he would have power to enter into a highly speculative trade or to start trade with borrowed capital. Because the karnavan is not accountable it does not follow that his agent is not, as broadly stated in a recent case [2]. The karnavan's immunity is personal and is not claimable by his agent or transferees. He may direct which or which portion of the family house shall be in possession of which member. There does not also seem to be anything against his entrusting portions of the family property to the management of junior members either for management or as an assignment for maintenance. He may terminate such arrangements at discretion [3]. *Prima facie* the possession of any junior member of any portion of the family property is not adverse to the family and the burden would be on him to shew that it is adverse [3]. But it cannot be said there is an incapacity to acquire by adverse possession [4]. The article of limitiaon applicable in such cases would be article 127 or 144 [5]. Junior members in management are presumed to be so by the sufferance of the karnavan *dejure* and the management is terminable by

1. *Abdur Rahiman Kutti* v. *Hussain Kunhi Kutti* (1919 I.L.R. 42 M 761 : 37 M. L. J. 316.

2. *Karunakara Menon* v. *Kuttikrishna Menon* (1917) M. W. N. 342 : 5 L. W. 511.

3. *Vira Rayan* v. *Valia Rani* (1881) 3 M. 141 ; *also Kannan* v. *Tenjee* (1882) I. L. R. 5 M. 1 *also Appunni* v. *Shangunni* (1871) 6 M. H. C. R. 401.

4 *Kanara Paniker* v. *Ryrappa Paniker* (1881) 3 M. 212.

5. *Muttakke* v. *Thimmappa* (1891) I. L. R. 15 M. 186.

him at will [1]. He may charge the tarwad with the expense of defending his acts as such [2] even against members of the family. Large as these powers may appear to be, they are only powers of management and do not include the power to take in adoption or to effect a partition [3]. There is no presumption that the debt incurred by him is for binding purposes of the family [4]. The creditor is to show not only that it was required for a purpose of the family but also that the resources of the family were not sufficient to meet the demand [5]. The same rule holds good as regards alienations within the scope of his individual authority [6]. His management may not be as prudent as that of another manager but unless he acts *mala fide* or with recklessness or utter incapacity, he cannot be removed from management. He is not accountable to any member in respect of tarwad property nor can a suit be maintained in respect of the tarwad property as against him in the absence of fraud on his part [7].

23. As regards the power of the karnavan it may be relevant to quote the observations of the Privy Council in the recent case of *Sahu Ram Chandra* v. *Bhup Singh* [8]. " The Law of the Mitakshara has however given to the father in his capacity of manager and head of the family certain powers with reference to joint family property. The

1. *Nambiatan Nambudiri* v. *Nambiatan Nambudiri* (1864) 2 M. H. C, 110 : *Mahalinga* v. *Mariyamma* (1889)I. L, R. 12 M. 462 ; *Kunhan* v. *Sankara* (1890)I. L. R, 14 M. 78 *Abdulla Koya* v. *Eacharan Nair* (1917) 35 M L. J. 405 *Govindan* v. *Kanaran* (1882) I. L R. 1 Mad. 351 ;

2. S. A. 266 of 1897.

3. *Raman Menon* v *Raman Menon* (1900) I. L R. 24 Mad. 73 ; *Arayalprath Kunhi* v. *Kanthilath Ahmad Kutti Haji* (1905) I. L. R. 29 Mad. 62 : *Velulhakkal Chirudevi* v. *Velulhakkal Tarwad Karnavan* (1916) 31 M. L. J. 879.

4. *Kutti Mannadiar* v. *Muthan* (1881) I L. R. 3 Mad. 288.

5. S. A. 268 of 1916

6. *K. Manoki Koran Nayar* v. *P. Manoki Chandu Nayar* (1867) 3 M.H.C. 294 : *Kombi Achan* v. *Lakshmi Amma* (1881) I. L, R. 5 M. 201.

7. *V. Narayanan* v. *V. Narayanan* (1880) I.L. R. 2 Mad. 328.

8. (1917) I. L. R. 39 All. 437 : 33 M. L, J, 14.

general principle in regard to that matter is that he is at liberty to affect or dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or mutt or of the guardian of an infant. In all of these cases where it can be established that the estate itself that is under administration demanded it or the family interests justified the expenditure then those that are entitled to the estate are bound by the transaction. It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of the Mitakshara. For where estate or family necessity exists that necessity rests upon the co-parceners as a whole and it is proper, to imply a consent of all of them to that act of one which such necessity has demanded." These with the following observations from *Hanuman Prasad Pandey's case* [1] would accurately sum up the powers of the karnavan as well. "The power of the manager of an infant heir to charge an estate not his own is under the Hindu Law, a limited and a qualified power. It can be exercised rightly in case of need or for the benefit of the estate. But where in a particular instance, the charge is one that a prudent owner would make in order to benefit the estate the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance is the thing to be regarded But of course if the danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on necessity which his wrong has helped to cause. Therefore, the lender in this case unless he is known to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free

1. (1856) 6 M. I. A. 393.

from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money." As regards onus of proof, the answer given in this case is that it is not capable of a general and inflexible answer. The presumption to be made will vary with circumstances. "Thus where the mortgagee himself with whom the transaction took place is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified he may reasonably be expected to allege and prove facts presumably better known to him than to the infant heir namely those facts which embody the representations made to him of the alleged need of the estate and the motives influencing his immediate loan." The contention which found favour with the judges in the earlier cases on Malabar Law and with the Travancore High Court that if "the factum of a deed or charge, be established and the fact of the advance be proved, the presumption of law is *prima facie* to support the charge and the onus of disproving it rests on the heir" was raised before their Lordships but did not meet with approval. The principle of this decision has been applied to simple loans [1], to leases [2] and to sales [3]. Application of the last case to permanent leases must be taken with the caution applied by *Palaniappa* v. *Devasikhamani* [4]. The doctrine of implied assent and necessity for

1. *Kottu Ramasmi Chetty* v. *Bangari Seshamma* (1881) I.L.R. 3 M. 145.
2. *Kunwar Durganath Roy* v. *Ramachandra Sen* (1876) I. L. R. 2 C 341.
3. *Mohamud Mandul* v. *Nafur Mondul* : (1899) I. L. R. 26 Cal. 820,
4. (1917) I. L. R. 40 M. 709 : 33 M. L. J. 1. (P. C.)

consultation of the other junior members will be discussed later on. The principle of these cases is applied in *K. Manoki Koran Nayar* v. *K. Manoki Chanda Nayar* [1] and *Kombi Achan* v. *Laxmi Amma* [2].

24. As in the case of an alienee from the manager of a Hindu family, if an alienee from a karnavan seeks to justify the alienation on the ground of due enquiry, it is not enough if he shews that he inquired of the karnavan and was satisfied with his statements [3]. He must make a reasonable inquiry. The existence of a decree even though *ex parte* against the karnavan is a sufficient protection to the lender. He is not bound to go behind the decree [4] but if there is sufficient on the decree to put him on enquiry he is not entitled to shut his eyes to those facts and rely merely on the decree [5]. It is not sufficient that he should be satisfied about the reality and the validity of the purposes for which the loan is taken; he must go further and satisfy himself that the resources of the family are not sufficient otherwise to meet the necessity [6]. There are certain charges such as maintenance and assessment that should ordinarily come out of the current income. It is specially incumbent on the lender alienee in such cases to satisfy himself that the income is insufficient to meet the charges [7].

25. Not only should there be necessity for an alienation but also for the particular kind of alienation. So where a usufructuary mortgage was executed to pay off a hypothecation though the hypothecation was binding the usufructuary

1. (1867) 3 M. H. C. R. 294.
2. 5 M 201 *See also Chappan* v. *Ram* (1912) I. L. R. 37 M 420.
3. *Valavatta Nair* v. *Kuppassan Menon* (1918) 36 M. L. J. 630.
4. S. A. 1471 of 1912 ; also S. A. 1038, of 1920. S.A 1580/20
5. *Mahamad* v. *Ithiru Amma* (1915) 30 I. C. 692.
6. S. A. 268 of 1916 and C. R. P. 1070 of 1916.
7. *Biuvaraha Aiyangar* v. *Natesa Iyer* (1917) M. W. N. 40.

mortgage was set aside as unnecessary [1]. We shall revert to this subject in a later chapter. As to what are necessary purposes, there is really no substantial difference between the case of an ordinary Hindu family and a Marumakkathayam family. Repelling hostile litigious attacks, building family house, maintenance of the members of the family, marriage expenses, expense of funeral ceremonies and medical charges are the usual kinds of necessity one comes across. In *Subba Shettethi* v. *Krishnacharya* [2] a hypothecation executed by the karnavan for the purpose of defending some of the members of the family who had been put up on a charge of rioting but who were acquitted on appeal was held binding. In *Beni Ram* v. *Man singh* [3] the amount raised for the defence of the head of an ordinary Hindu family was held binding though ultimately he was convicted. This case was followed in *Ramalingam* v. *Muthayan* [4]. These cases proceed upon the view that till the contrary is proved, a man is innocent and the amount raised for his defence would be binding against the family. If the creditor had knowledge of all the circumstances of the case, which would show that the the family member was guilty, the view of their Lordships apparently is that the debt would not be binding. This ignores that even a guilty person requires a defence so that he might be convicted on the proper materials. That stands at the threshold of the English theory of criminal trials. The only question is one of reasonableness. In all cases where conviction involves a stain upon the character of the person the family might well undertake the defence. In a way, expenses of defence in criminal cases stand on much the same footing as medical charges. As this view involves a rather indefinite and dangerous commitment especially having regard to the tendency to to make very costly arrangements for defence, it may be a

1. S. A. 1064 of 1894.
2. (1910) 21 M. L. J. 159.
3. (1911) I. L. R, 34 All. 4.
4. (1914) I. L. R. 26 M. L. J. 528.

safe view to lay down, as the Travancore High Court has done, that the liability of the family depends upon the acquittal of the member concerned [1]. The creditor who advances the loan may be protected if he has reason to believe that the accused is innocent. If a large number of the members of the family support the karnavan it may not be necessary for him to make further enquiry into the matter. The rule upholding an alienation on the ground of proper inquiry may protect the lender if the loan is given to the karnavan but if the loan is made to the junior member, the liability of the family would be dependent entirely on the mode of termination. Except to this extent, it is difficult to see how the position of the managing member can stand on a different footing from that of any other member. So far as the expenses of prosecution are concerned, except in cases where the vindication of family titles such as possession proceedings or prosecution for theft to assert title go, there seems to be little reason why the family should be put to such expenses.

26. Here one may pause to draw attention to some useful distinctions in the matter of karnavan's powers. There is a well marked distinction for instance, between acts of management and acts of alienation. Whereas in respect of the former his powers are to all intents and purposes absolute, in respect of the latter he can act only with the consent express or implied of the other members. Some acts are clearly acts of management while others are clearly, acts of alienation. Acquisition of property for the family investment of family funds, provision for family maintenance, discharge of family debts, carrying on of family cultivation, determination of crops to be raised on the family lands—all these are obviously acts of management. Gifts and sale are equally clearly acts of alienation. There are, however, some acts which it is not easy to say under which category they fall and some may fall within either category

1. 5 Tr. L. R. 128.

according to circumstances. The only way of enjoying certain kinds of property oftentimes is by alienating them; for instance the crops can be enjoyed (beyond such portion as may be necessary for home consumption) only by selling them. Forest lands are ordinarily enjoyed by selling timber. *Verumpattom* lease or yearly lease on rack rent is quite an ordinary mode of enjoying the family lands. All these, though acts of alienation in a sense, are substantially acts of management and there is no question of necessity or consent of junior members in respect of them. Similarly in the case of certain ancient opulent families the customary mode of enjoying lands is by granting othis or kanoms and on the expiry of the customary period granting melcharths. In their case the granting of kanoms and othis is a mere act of management. But these very acts may in certain circumstances be acts of alienation to which the test of necessity would have to be applied, for instance, even a *verumpattom* lease of lands cultivated by the family as homefarm when the family is an agricultural family dependant for its sustenance upon such cultivation may be an act of alienation. A kanom granted on unusually onerous terms or where the circumstances of the family have so patently altered as not to justify a dealing with the property in that manner may similarly be an act of alienation and may have to be justified by adequate necessity A melcharth or renewal granted much in advance of the term is bad unless justified by necessity [1] and that whether the grantor is alive or dead at the date of the expiry of the kanom. [2]. It is said however that it is only voidable and as

1. *Raman Nambiyar* v. *Raman Nambiyar* (1914) 27 M.L.J. 175 ; *Cheirya Cherekandan* v. *Krishnan Nambiyar* (1912) 27 M. L. J. 690 ; *Venkitammal* v. *Raman Nair* (1916) 34 I. C. 931 ; *Abdulla Koya* v. *Eacharan Nayar* (1917) 5 M. L. J. 405, *Valtavatta Nair* v. *Kuppason Menon*, (1918) 36 M. L. J. 630 ; *Cheriya Kunhammad* v. *Kunhunni* (1920) 38 M. L. J. 461.

2. *Moidin Kutti* v. *Kunhi Koyan* (1914) 27 M. L. J. 691 ; *Cheria Kunhammad* v. *Kunhunni* (1920) 38 M. L. J. 461 ; but *see* S. A. 774 of 1917.

such the objection is not available to strangers [1]. There is no reason why an investment though it takes the form of immoveable property should not be varied by the karnavan and the process may involve an alienation. A hypothecation may well be assigned over without proving necessity for the act. Similarly a decree for money or a debt may well be assigned for consideration without showing any necessity therefor [2]. Even immoveable property purchased in the course of realisation of a mortgage security may be sold but when the purchase has been recognised as a permanent investment or is necessary for the family purposes or is added on to the family holding, thereafter it is to be treated as ordinary family property. The mode in which the property of this nature is dealt with may be material in determining the footing on which it is to be treated. For a family carrying on money lending as business the presumption would be that the purchase is not intended to be permanent. In determining the question as to whether an act is an act of management or an alienation local usage rather local practice may be a valuable guide. We doubt if reference is made in *P. P. Kunhammod Hajee* v. *Kutliath Hajee* [3] to local practice for any other purpose. In Travancore the karnavan has absolute power of disposal over movables. In *Subrahmania Pattar* v. *Krishna Embaudiri* [2] Mr. Justice Sadasiva Iyer holds that the rule obtains in Malabar also. The other Judge Mr. Justice Spencer has expressed no opinion on the point. This absolute power of disposition must be limited to cases where the customary mode of enjoyment is by disposal. It would be extraordinary if such a power should be recognised in respect of family jewels. Giving effect to the rule to the fullest extent, does not amount to saying that he can apply the proceeds for other than tarwad purposes or make gifts of them to

1. *Kunhamma* v, *Moidin Kutty* (1916) 34 I. C. 755 and *Abdulla Koya* v. *Echaran Nair* (1917) 35 M. L. J. 405.

2. *Subramania Pattar* v. *Krishna Embranderi*, (1920) 39 M. L. J. 590.

3. (1881) I. L. R. 3 M. 169.

strangers [1]. Though it may be as to acts of management the karnavan has large, even uncontrolled discretion and a third party dealing with him is unaffected in the absence of fraud [2], any lapse from the standard to be expected of a careful manager may count against the manager himself in a suit for his removal. Some of the observations in *Abdulla Koya* v. *Echaran Nair* [3] seem to proceed on the now exploded theory of karnavan's right to the income subject to the fulfilment of his obligations to the family. A lease may be improvident and yet *bona fide* but when the improvidence reaches a certain point it becomes fraud and there is no reason why the family should not question the transaction as being a gift though in the guise of a lease. Where in the course of a *bona fide* act of management the manager denies the title of the landlord, the family interest in the land may be forfeited by such denial [4].

27. Another distinction that is useful is that between compulsory duties and powers that are discretionary. Maintenance of junior members, payment of interest on family debts and the performance of the family ceremonies would come under the former class, while giving an English education, maintaining the family on a comfortable scale, and such other acts may be unobjectionable acts if funds permit but which he cannot be compelled to undertake. It is easy to instance several other acts which it is open to the karnavan to do but which he cannot be compelled to do.

28. There are certain fallacies current in connection with the subject that seem to die very hard. Mr. Wigram made the statement and Mr. Moore repeats it that the "karnavan

1. *Keshavan Narayan* v *Damodaran Keshavan* 3 Tr. L. J. 362.

2. *Abdulla Koya* v. *Eacharan Nair* (1917) 35 M. L. J. 405 ; *Vythinathan* v. *Padmanabha Pattar* (1918) 45 I. C. 659 and S. A. 276 of 1916, (reducing rate of interest on investment).

3. (1917) 35 M. L. J. 405.

4. *Muringa Mangalath Gopalan Nayar* v. *Valia Tamburatti* (1883) 7 M. 87.

for the time being has an almost absolute control over the distribution of the family income and the family expenditure." So also Mr. Strange in his report as a special commissioner on the affairs of Malabar says "the theory of a Hindu family in Malabar is that the head thereof has entire control therein." Mr. Mayne (See para. 268 of his Hindu Law and Usage) observes that "where the property is indissoluble the members of the family may be said to have rights *out of* rather than *in* the property. The head of the family is entitled to it in entire possession and is absolute in its management." These statements of the law are inaccurate and misleading. The karnavan of a tarwad has no more power than a manager of a Mitakshara family. He has not a greater beneficial interest in the tarwad property than any other member of the tarwad [1]. He is not a mere agent, nor is the manager in a Mitakshara family. Neither of them can be controlled in his management by the other members of the family, provided the acts are those of a prudent manager. Their powers are not the result of delegation by the other members of the family and cannot be restricted or affected by the dissent or the opposition of the other members [2]. But equally in the case of the manager and the karnavan, they have no right to appropriate the property to themselves except in so far as it is required for their legitimate expenses. When it is said, therefore, that a karnavan has an absolute control over the distribution of the family property and the family expenditure, it should not be understood that he is at liberty to do anything he likes with the income of the family property. He cannot give it away to strangers. He cannot use it for any but tarwad purposes. He has no right to appropriate an undue proportion of it to his own use and he is bound to be fair and impartial in the treatment of the various members of the family. "Equal dealing is the duty; all are equally entitled

1. *Varanakol* v. *Varanakol* (1880) I. L. R. 2 Mad. 328 at 331.

2. *Eravanni Revivarman* v. *Illapu* (1876) I. L. R. 1 Mad 153 at page 157

to support." [1] He has no doubt a certain amount of discretion in dealing with the income. He is not bound to give an equal amount or share to every one. He may consider the means and the circumstances and the resources of each member in determining what allotment should be made to him; and the Courts will no doubt deal with him generously in allowing him to exercise his discretion. But it is misleading to say that he has an absolute control over the distribution of the income. If he be grossly partial or unfair, or if he appropriates the income to his own use or uses it for other than tarwad purposes, the Court can certainly take cognisance of it. [2] The fact that a karnavan had a large family income in his hands but did not pay the family debt was taken against him in a suit for his removal [3]. If the karnavan squanders the family income, there is no means of recovering it for the family. There is no precedent for compelling the manager to make good out of his private properties the loss sustained by the family by his improvidence or even by his fraudulent dealing. The only remedy that the family has is to remove him. We must take the observations in *Kenath Puthen Vittil Tavazhi* v. *Narayanan* [4] in this sense. If the income has gone into the hands of a stranger that latter can be made to restore it and similarly also, if the income has been invested, the investment will be reckoned as family property. In fact the reason for the presumption that property acquired by a karnavan is family property in the absence of proof to the contrary is the family character of the income and the difficulties in the way of tracing by individual members who have no means ordinarily of controlling their karnavan.

1. *Koran Nayar* v. *Chanda Nayar* (1867) 3 M. H. C. R. 294 at 295.

2. *Marudevi* v. *Pammakka* (1911) 36 M. 203 at 205; *Govindan Nair* v. *Narayanan Nair* (1912) 23 M. L. J. 706.

3. *Kunhanna Shetty* v. *Timmaju* (1914) 27 M.L.J. 60.

4. (1904) I. L. R. 28 Mad. 182.

Mr. Wigram laid down that a karnavan may appropriate half the family income for his own expenses and for extraordinary expenses of the tarwad. But the High Court held that no such rule can be laid down.[1] In suits for maintenance there is no doubt that the Courts will decree an equal allowance to all the members unless there be circumstances justifying a diminution; and the karnavan is bound to act on the same principle. It may not be easy for the Court always to correct the karnavan where he does not act properly. The remedies the junior members have against a karnavan who acts improperly in the discharge of his duties will be considered later on. This much may be stated here that every improper act of his can be considered in a suit for removing him from management. Mr. Mayne, when he states that a member of a tarwad has rights out of the property rather than to the property does not seem to make any difference between the position of the Anandravans of a Malabar tarwad and the junior members of an ordinary Hindu family. For he proceeds to say: "A family governed by the Mitakshara Law is in a very similar position except as to their right to a partition and to an account as incident to that right." It is misleading if not fallacious, to say of the rights of the junior members of a Mitakshara family or a Marumakkathayam tarwad that they have no rights to the property but rather rights out of the property. As pointed out by the High Court in *Varanakot* v. *Varanakot*[2] the karnavan "is interested in the property of the tarwad as a member of it to the same extent as each of the other members. All the members including the karnavan are entitled to maintenance out of the tarwad property." In *P. P. Kunhamod Hajee* v. *Kuttiath Hajee*[3] Turner C. J. and Muthuswami Aiyar J. in pointing out the distinction between the incidents of the property held by a Mitakshara

1. *Narayani* v. *Govinda* (1884) I. L. R. 7 Mad. 352.

2. (1880) I. L. R. 2 Mad. 328. 3. (1881) I L. R. 3 Mad. 174.

family and that held by a Malabar tarwad, observe that the rights of the latter are less developed than those of the former, and seem to quote with approval the above statement of Mr. Mayne. They proceed: "The respect for elders, which is a marked feature of all Hinduism is nowhere stronger than in Malabar, and consequently, although the individual interest of the manager of a tarwad in the tarwad property is considerably less than that of a manager of a Hindu family, he has, in the management of the tarwad property somewhat larger powers than are accorded to a manager of a Hindu family. While equally with the manager of a joint Hindu family he is incompetent to alienate the estate without the consent of the other members of the tarwad, except to supply the necessaries of the tarwad and to discharge the debts of the tarwad, he can not only make leases at rack rents ordinarily for the term of five years for cultivation, but leases with fines payable at the expiry of the term in the nature of mortgages (kanoms and othis) in which little more than a right to redeem may be left to the family *Edathil Itti* v. *Kopashon Nair* [1]. We have not been able to ascertain that he has ordinarily power to make any other dispositions of property such as are sanctioned by local usage [1], and although this Court ought, so far as it is justified in so doing, to construe liberally the powers which managers are competent to exercise so as to enable them to deal with tarwad property as it would be dealt with by a prudent owner for the benefit of the family and to interpose no unnecessary obstacles to the employment of property in new industries, in so doing it undertakes what in some cases would be no easy duty—the determination of what acts are and what are not beneficial; and it cannot lose sight of the fact that the office of the karnavan is fiduciary [2] and that a Court has no authority to confer on a karnavan larger powers than are sanctioned by local usage." The power to make kanom and othi exists

1. (1862) 1 M. H. C. R. 122.

2. *Koilath P. M. Koran* v. *P. M. C. Nair* 2 Mad Jur. 117.

where it does only because in the case of families of the ancient landlords and other well-to-do families, that is the ordinary mode of enjoying the property ; and a manager, of course, would have power to do everything which is in accordance with the customary mode of enjoyment. It does not show that the powers of a manager of a Malabar tarwad are higher than those of manager of a Mitakshara family. It is impossible that the karnavan of every tarwad should have the power to grant kanoms and othis. Take for instance a family of agriculturists and not of landlords ; would the karnavan have the power to borrow money and to give away the lands on mortgage for a term of 12 years unless the money is borrowed for the benefit or the necessities of the tarwad ? The case cited by their Lordships [1] does not seem to bear out any general proposition affirming the karnavan's right to make kanom or othi. Scotland C. J., with whom Strange J, concurred, observed in that case that an othi is different from a sale which, in their Lordships' view requires the concurrence of the senior anandravan. Regarding the power of a karnavan to create an othi, their Lordships merely say that " a karnavan may singly create it for proper reasons." The manager of a Mitakshara family, has similar power to create a mortgage singly, provided there is adequate family necessity or the transaction is for the benefit of the family. No doubt the proposition that the karnavan may grant a kanom or an othi is often stated in general terms [2]. But the question was not really in issue in any of those cases, and such a right would not be upheld in all cases without proof of necessity or manifest advantage to the tarwad. As already stated in the case of some families the usual mode of enjoyment is by granting kanoms and othis, and in such cases the karnavan's power to create such mortgages may be absolute as being an ordinary incident of management. But

1. *Edathil Itti* v. *Kopashon Nair* (1862) 1 M. H. C. R. 122.

2. *Varanakot* v. *Varanakot* (1881) I. L. R, 2 Mad. 328 at 330 ; *Per Collins C. J. in Vasudevan* v. *Sankaran* (1896) I. L. R. 20 Mad. 129 at 133 (F. B.)

there is no justification for assuming any general rule that mortgages of the sort may always be created by a karnavan without any special reason. For instance, Dr. Ormsby says "A mortgage for a fixed term is beyond the scope of the karnavan's powers and requires assent (of the junior members) in the same manner as a sale" [1] Again "It has been repeatedly held by this Court in a long series of decisions that a karnavan cannot make an othi and kuli kanom mortgage of property: (A.S. 126 of 1057 and A S. 155 of 1068)." He proceeds to say that alienations by way of ordinary mortgage may be made by the karnavan alone if made for the benefit of the joint family. Another of the statements to which exception must be taken is that the property of the family is vested in the karnavan [2]. This is no more true of the karnavan than of the manager of a Hindu family. The property is vested not in the manager alone, but in all the members of the family or the tarwad. No doubt owing to the absence of the right to partition, the junior members of the tarwad are in a large measure but impotent owners. But in the eye of the law their ownership is as good as that of the karnavan. As pointed out in *P. P. Kunhammad Hajee* v. *P. P. Kuttiath Hajee* [3] the karnavan's office like that of the manager of a Mitakshara family is a fiduciary one, though both are more than mere trustees [4] inasmuch as besides their right of management they possess rights of ownership equally with the other members of the tarwad or the family. *Kunhi Chekkan* v. *Lydia Arukandan* [5], *Kalliani* v. *Govinda Menon* [6] and *Sultan Ali Raja* v. *Cheria Kunhi*

1. See Art. 23 p. 14. Outlines of Marumakkathayam Law as administered in the Travancore High Court.

2. *Varanakot* v. *Varanakot* (1881) I. L. R. 2 Mad. 328 at 339; *Per Collins C. J. in Vasudevan* v. *Sankaran* (1896) I. L. R. 20 Mad. 129 at 133 (F. B.)

3. (1881) I. L. R. 3 Mad. 174.

4. *Varanakot* v. *Varnakot* (1881) I.L.R. 2 Mad, 328.

5. (1912) 14 I C. 480: (1912) M. W. N. 386.

6. (1911) I. L. R. 35 Mad 648.

Kannan [1] view these questions from the right stand point and have considerably cleared the air. In *Govindan Nair* v. *Narayan Nair* [2] it was held that the tarwad property was not the individual property of the karnavan in any sense of the term and as such a manager under the Lunacy Act could not be appointed in respect of it.

1 (1915) 29 M. L. J. 633 2. (1913) 23 M. L. J. 705

CHAPTER V.

THE KARNAVAN: HIS POWERS OF ALIENATION.

29. Karnavan's power of alienation-law unsatisfactory—Hindu law. 30. Consent of junior members, necessity for--Sales and other alienations, 31. Travancore decisions—Sales, 32. Consent of adult members—Effect of—presumption of necessity--Rebuttable, 33. Moveables—Power of Karnavan in Travancore, 34. Mortgages—Necessity for consent, 35. Simple debts--Burden of proof. 36 Origin of rule as to consent discussed, 37. Right rule—Necessity, true test—Nair Regulation, 38. Benefit, Sale manifestly beneficial, 39. Law in British Malabar, old rule. 40. Case Law—Discussion of. 41. Mortgages, the rule as to.

29. The law as to the authority of a karnavan of a Malabar tarwad to alienate tarwad property is still in an unsatisfactory condition. According to the Mitakshara system of Hindu Law, the manager of a joint Hindu family has authority to alienate, whether by way of mortgage or sale, the property belonging to the family, where such alienation is beneficial to the family, or, having regard to the necessities of the family, is a prudent act of management, though even under that system, there has been some conflict as to the necessity for consultation and concurrence of other members as in the Marumakkathayam and the latest judgment of the Privy Council gives sanction to the theory of implied assent.[1] As the law is generally understood at present there is no difference between the manager's powers to mortgage and to sell. In the case of a sale, it has of course to be shown that so serious an act as outright alienation of the property was beneficial or necessary, and circumstances which may justify a mortgage might be insufficient in many cases to support an absolute sale But the rule of law is the same in both cases, namely,

1. *Sahu Ram Chandra* v. *Bhup Singh* (1917) I. L. R. 39 All. 437 P.C. See also *Gharib Ullah* v. *Khalak Singh* (1903) I. L. R. 25 All. 407 (P.C.) : *Upooroop Tewary* v. *Lalla Bandhjee Sahay* (1881) 1 L. R. 6 Cal. 753 : *Miller* v. *Ranga Nath Moulik* (1885) : I. L. R. 12 Cal. 389 : *Dir Bijai Singh* v. *Bhan Partab Shah* (1911) 9 A. L. J. 63. Strange Vol. II page 344, Mayne Art. 346 and *Nathaji* v. *Sitaram* (1902) 4 Bom. L. R. 587.

the transaction must be beneficial or necessary. This rule is modified by the rule of equity, which can hardly be said to have its origin in Hindu Law, but is imported from English Law, namely, that though in fact an alienation may not be justifiable according to the rule of Hindu Law above mentioned, an alienee who makes due enquiry and honestly believes that the alienation is a proper one will be protected and the alienation upheld. For otherwise it will be difficult for strangers to deal with the manager of a Hindu family, and the manager will be seriously embarassed in his management. And this will finally lead to the detriment of the family itself, as its managing member will not be able to raise the funds necessary to discharge his duties in consequence of the great risk which the alienee runs by dealing with him. This equitable rule is now embodied in S. 38 of the Transfer of Property Act. The substantive rule of Hindu Law is also supplemented by a rule of evidence, which also is not of Hindu origin, namely, that the burden of proving that any alienation falls within the power of the manager is on the alienee, who must prove that the alienation was necessary or beneficial to the family, or that he is entitled to have the alienation upheld under the equitable rule above mentioned. There is no reason why these principles should not be held equally applicable in the case of the karnavan of a Malabar tarwad. The fact however is that the Courts have not yet made up their minds as to the exact rule to be laid down with regard to the karnavan's power of alienation. In the early decisions a sharp distinction is made between the karnavan's powers of contracting debts and his authority to alienate the family property and it is laid down that while he is entitled to *pledge* the family credit for proper family purposes, he has no right to alienate the family property without the consent of the other members of the tarwad, and that to validate an alienation the consent of all the members, whether express or implied, is necessary. It is not quite clear whether the rule was supposed to apply to

absolute sales of tarwad property only or to mortgages in the shape of kanoms and othis and saswathoms or permanent leases also. Undoubtedly, we find passages now and then in the judgments of the Courts to the effect that the rule is applicable to mortgages and other forms of alienations equally with absolute sales. But on the whole the preponderance of opinion seems to be in favour of the view that the rule was mainly applicable to *Jenm sales*. With regard to simple debts, the Karanvan's powers were regarded as very extensive. The presumption was that debts contracted by him were incurred for lawful purposes and binding on the tarwad : and it lay on the junior members to prove that the debts were not binding on the family. It is not altogether easy to state how far these propositions may still be regarded as correct, but the following propositions are believed to fairly summarise the decisions: (1) The rule that simple debts contracted by a manager should be presumed to be proper debts incurred for lawful tarwad purposes is no longer upheld ; and the principle ordinarily applicable to all persons with limited powers of dealing with property and enunciated by the Privy Council in the case of *Hanuman Pershad Panday* v. *Mussammat Babooe* [1] is equally applicable to the karnavan of a Malabar tarwad. The weight of the onus may differ according to the nature of the case, and it may be that where all the adult members of a family join in a bond or mortgage, the consent of the adult juniors to the transaction entered into by the Karnavan might be sufficient to shift the onus. Beyond this there is no invariable presumption that the debt is binding against the family [2]. (2) There is no distinction between simple debts and mortgage debts. The karnavan's powers and the rule as to burden of proof are the same in both cases.

30. In fact in all cases except that of absolute sales it may be taken as fairly established so far as the British Courts are

1. (1856) 6 M. I. A. 393.

2. *Kutti Mannadiyar* v. *Payanu Muthan* (1881) I. L. R. 3 Mad 288 and *Kombi Achen* v. *Lakshmi Amma* (1882) I. L. R. 5 Mad. 201.

concerned, that the karnavan is singly capable of dealing with the property of the tarwad ; provided the transaction, whatever be its nature, is beneficial to the tarwad or necessary in its interests. In the case of absolute sales no definite rule can yet be said to have been laid down. Some cases hold that the consent of the family, that is, the consent of all members, or at least of the majority, would be necessary to validate a sale while in other cases it is held that the real test is whether the sale is beneficial or necessary to the tarwad. In cases where the former view is held, the circumstance that it is beneficial or necessary is taken *prima facie* as evidence of the consent of the senior anandravan or of the junior members while in decisions holding the latter view the consent of the senior anandravan is held to be *prima facie* evidence that the sale is beneficial or necessary. The tendency of the Madras High Court appears to be in favour of putting absolute sales on the same footing as limited alienations, and to hold that where the sale is necessary or beneficial it is valid although the anandravans of the tarwad may not consent to the sale. Before examining the state of the law at some length, it may be convenient to refer to the view held by the Travancore High Court on the question.

31. In Travancore as in British Courts we find some fluctuation as to whether the test of validity as to absolute sales should be the purpose for which it is made, or whether it should be the assent or dissent of the junior members. But the latter view seems to be prevailing. Thus in *Ummamman* v. *Krishnan Govindan* [1] Ormsby and Kunhi Raman Nayar, JJ. held that even if the karnavan and senior anandravan join in a sale, it will not be upheld in the absence of necessity. The learned judges refer to *Koran Nair* v. *Chanda Nair* [2]. The tendency of this ruling, relying as it does on the case above referred to, is distinctly in favour of holding that the test of the

1. (1882) 1 Tr. L. R. page 94. 2. (1867) 3 M. H. C. R. 294.

validity of the sale is the existence of the necessity. But in *Padmanabhan* v. *Govindan* [1] a different note is struck, the same learned Judges Ormsby and Kunhi Raman Nayar JJ. laying down " we think the law is perfectly clear that where there is an anandravan of adult age and not otherwise disqualified, a sale by the karnavan alone is bad in law, even though such sale is assented to by a female member and that even the existence of necessity is no answer to the suit." As a matter of fact the Court found against the existence of any necessity for the sale, but the decision is put on the ground that the absence of the senior anandravan's consent invalidates the sale. On the other hand in *Manika* v. *Krishnan* [2] Narayana Pillai and Ariyanayagom Pillai, JJ. held that a mortgage by a karnavan, even if supported by the chief anandravan, may be disputed by the other anandravans on the ground of want of necessity. Stress seems here to be laid on the necessity for the sale and it would seem as if the learned Judges thought that that was the test of its validity. But we find in *Mathu* v. *Kochakko* [3] Narayana Pillai, Kunhi Raman Nayar and Cosby, JJ. holding that an outright sale of property cannot be made by a karnavan without the express consent of the senior anandravan. Finally we find a Full Bench composed of Krishnaswamy Rao, C. J. Ormsby, Kunhi Raman Nayar, Sitarama Aiyar and Govinda Pillai, JJ. laying down in a case in which the karnavan and the senior anandravan sold tarwad property for the funeral expenses of their mother, that the sale was not binding upon the tarwad, because the consent of the junior members who instituted the suit had not been obtained.[4] The learned Judges say that every member has the right to be consulted before the sale. Kunhi Raman Nair J. argues. " The karnavan is not the agent of the family to make permanent alienations

1. (1883) 2 Tr. L. R. 68 2. (1884) 3 Tr. L.R. 44.

3. (1886) 5 Tr. L. R. 6.

4. *Krishnan* v. *Ayappu* (1889) 6 Tr. L. R. 49.

In the case of a gift or sale the assent of the whole family is required. Strict orders were at one time issued by the Sirkar to the Oor-Kanakans or village notaries before whom documents in connection with lands were registered before the introduction of the Registration Regulation, to take the consent of such of the members of the tarwad as were capable of giving consent, before a sale deed was passed by them, and the Travancore Suddar Court went to the length of holding that a karnavan could not without the consent of the anandravans renew an old mortgage, increasing the charge on the property and extending the time for redemption (Appeal No. 2 15 of 1905)" "The signature of the senior anandravan" continues the learned Judge, "is prima facie evidence of the consent of the junior members but the notion that it would be sufficient to validate the sale, is based on a misconception. Every anandravan is entitled to an opportunity to save the property." He distinguishes the case, *Kalliani* v. *Narayana* [1]. He says that the Mitkashara Law is not applicable to Malabar families, and that looking to the constitution of Marumakkathayam families the members of which are sometimes remote relations, and the karnavan of which is a man whose duties often conflict with his interest, it is unsafe to apply the Mitakshara Law by analogy. It is an open question, says he, whether even under the Mitakshara Law, the consent of those who are of age can be dispensed with in the case of a *sale* even when the transaction is for the benefit of the family. Govinda Pillai, J. concedes that the rule is a great hindrance to the alienation of tarwad property and that it may also be a sound rule of administration to facilitate transfers. But, according to him, the policy of Marumakkathayam Law does not allow it. This decision may be taken to have settled the law for Travancore, and it is not necessary to refer at length to the subsequent cases in that State. The decision was affirmed

1. (1885) I L. R. 9 Mad 266.

and extended to all cases of permanent transfers in *Mathandan* v. *Velayudan* [1] and *Geevareeth* v. *Raman* [2].

32. In *Raman* v. *Parvathi* [3] it was held that though the assent of the senior anandravan to a sale might be *prima facie* evidence of the consent of the other members, such presumption could be rebutted. In *Kesavan* v. *Kesavan* [4] Kunhi Raman Nair and Cosby, JJ. held that when all the adult members of a tarwad sell family property, the minor members are concluded thereby in the absence of fraud. However, it has since been held that consideration is essential for the validity of the alienation [5].

33. In Travancore a karnavan has absolute power to deal with moveables as he likes [6]. A similar rule was once applied in the case of the manager of a Hindu family, but is no longer recognised. The rule may safely be applied to moveables, the customary mode of enjoyment of which would be by disposal, or where disposal is resorted to only for realisation or having regard to their small value, any minute scrutiny of the karnavan's acts would be vexatious but it is impossible to accept it with regard to valuable movables, such as jewels belonging to a tarwad, nor can the rule apply for instance where in a trading family the karnavan chooses to make improper alienations of the stock-in-trade. If he should be held to possess such absolute powers, the result is he might practically be able to dispose of all family property. It is to be doubted if the rule as stated means anything more than that the karnavan may dispose of movables for the necessary purposes of the tarwad or in the due course of management without consulting the junior

1. (1894) 12 Tr. L. R. 97.
2. (1889) 7 Tr. L. R. 159.
3. (1895) 13 Tr. L. R. 214.
4. (1895) 12 Tr. L. R. 99.
5. *Nilakantan* v. *Matheva* 6 Tr. L. J. 191.
6. *Velayudhan* v. *Velayudhan* (1895) 12 Tr. L R 87 : *Aiyappan Keshavan* v. *Nilakantan Govindan* 21 Tr. L. R. 174.

members. Judicial opinion is tending towards this point as may be seen from *Raman* v. *Kochukunji Amma* [1]. To a certainty the power does not extend to enabling the karnavan to give the moveables to any person he likes without receiving any consideration therefor [2].

34. A mortgage for a fixed term is treated in Travancore as being on the same footing as an absolute sale and is, consequently, held invalid, unless it is assented to by the junior members of the tarwad [3]. It would, no doubt, be correct to treat alike absolute sales and all transactions which, though not in form of that character substantially amount to a disposal of the entire right of the family as a permanent lease or a mortgage for a very long term [4]. But it would be going too far to say, as Dr. Ormsby does, that every mortgage for a fixed term is beyond the scope of the karnavan's powers and requires assent in the same manner as a sale. He is probably supported by some rulings of the Travancore High Court, for he quotes a passage to the effect that it had been repeatedly held by the Courts that a karnavan may not make an Othi and Kuzhi Kanom lease of the property without the consent of the heirs. But this is too wide [5] and would considerably hamper the karnavan in his management.

35. The Travancore law is, on the other hand, liberal to the karnavan with respect to his right to create simple debts and ordinary mortgages without a fixed term. The presumption in such cases is that the debt or mortgage is for proper tarwad purposes and the onus is on the junior member to show that it is not [6]. The creditor is to show that he paid consideration and then the onus is

1. (1908) 23 Tr. L. R. 133.

2. *Sesha*van v. *Damodaran* 3 Tr L. J. 362.

3. Dr. Ormsby p. 14, S. 23 ; *Manicka* v. *Krishna* (1884) 3 Tr. L. R. 44.

4. *Aiyaptan Raman* v. *Krishnan* (1891) 8 Tr. L. R. 116. *Kathutha Krishnan* v. *Ipe*. (1889) 6 Tr. L. R 49 *Madhavan* v. *Padmanabhan* (1897) 12 Tr. L. R. 97.

5. Dr. Ormsby p. 16 ; A S. 8 of 1048.

6. *Krishnan Aiyappan* v. *Padmanabhan Raman* (1905) 21 Tr. L. R. 239.

shifted on to the members of the family impeaching the transaction to show that the debt was not incurred for a family purpose. The rule is however, held not to be applicable where a junior member is the manager and performs the functions of the karnavan [1]. The reason given for the distinction is: creditors who deal with a junior member acting as a manager with the permission expresss or implied of the real karnavan are bound to use greater precaution and to see that the manager is acting within the scope of his authority and for the benefit of the tarwad [2]. "He is not a complete karnavan *i.e.*, representative of the tarwad. His management makes him a de facto karnavan but in the eye of the law, he is not so. That is, he is not on that account given that position which a natural karnavan occupies in the tarwad by law. All his dealings are *prima facie* his own but if any of them are shown by evidence to have been in connection with his management for the benefit of the tarwad the same might affect the tarwad and not otherwise." [3]

36. There is no doubt that in early times the head of a family was not at liberty permanently to alienate the immoveable property belonging to it, without the consent of the other members. This was by no means a principle peculiar to the joint family in Malabar. It applied equally to all Hindu families governed by the Mitakshara and Dayabhaga systems of law; and the consent not merely of the other members of the family was required but that of the reigning sovereign and of the caste and relations generally was deemed indispensable[4]. Vijnaneswara says "land passes by six formalities, by consent of townsmen, of neighbours, heirs, and by gift of gold and water. In regard to the im-

1. *Krishnan* v *Raman* (1888) 7 Tr. L. R. 126. *Ramaswamy Aiyar* v. *Velayudhan* (1904) 21 Tr. L. R. 256. *Padmanabhan Mallen* v. *Sankaranarayanan* (1898) 14 Tr. L. R. 128 (F. B.)

2. *Govindan* v. *Ayyappan* (1887) 6 Tr. L. R. 30.

3. *Krishnan* v. *Raman* 7 Tr. L. R. 126.

4. See papers on Mitasi right, page 202; See also Mayne's Hindu Law and Usage S. 212.

movable estates, sale is not allowed. It may be mortgaged by the consent of parties interested." [1] Also "Separated kinsmen as well as those who are unseparated are equals in respect of immovables for one has not power over the whole to make a sale, gift or mortgage." The rule was applicable as much to self-acquired as to ancestral immovable property. There is no doubt that in Malabar the people cling with even more tenacity to landed property than their brethren elsewhere; and one may take it that the rule requiring the consent of anandravans did originally prevail in Malabar [2]. Mr. Wigram made the statement and Mr. Moore repeats it that mortgages also are invalid unless made with the assent, express or implied, of the junior members. It is however said that in cases of mortgages and simple bonds it is sufficient to prove implied assent on the part of the family [3] and that such assent will be implied if the transaction is shown to have been for the benefit or necessity of the family. It may be the power originated that way but to state that in those circumstances assent should be implied is merely to introduce confusion. But it may be noted that the Privy Council use similar language in *Sahu Ram Chandra* v. *Bhup Singh* [4].

37. The karnavan's power should depend on the nature of the transaction; and not on the assent or the dissent of the anandravans. His powers are not derived from them, though they should be exercised for their and his benefit and are restricted and controlled by considerations relating to the nature of the transaction. There is really no reason why the rule applicable to families governed by the Mitakshara Law should not be equally applicable to Malabar tarwads. It is true as pointed out by Mr. Justice Kunhi

1. Mitakshara Ch. 1 Sec. 1 v. 31 and 32.
2. Walker's Report on Malabar Land Tenures; Vyavahara Samudram cited in Moore's Malabar Law p. 148.
3. Moore's Malabar Law p. 147.
4. (1917) I. L. R. 39 All 437 P. C.

Raman Nayar. In *Krishnen* v. *Ipe* [1], that the junior members of a tarwad are often but distantly related to the karnavan or manager and that they have no power to enforce partition of the tarwad property. But these are grounds for scrutinising the acts of the karnavan and requiring satisfactory proof that the sale is necessary in the interests of the tarwad or that it is clearly productive of positive benefit to it. The junior members may for one reason or another be perversely obstructive just as much as the karnavan may be selfish, improvident or wasteful. Suppose it is impossible to save the tarwad except by selling a portion of its estate but the anandravans refuse to sanction the same; can it be held that the karnavan is bound to submit to their will and allow the family to be ruined? It is possible that the junior members have self-acquired property of their own and may not care for the family property and that the karnavan may have no separate property. Every member has a right to see that the tarwad properties are, as far as possible, conserved for the common benefit of the whole tarwad. It would be unreasonable to say that the karnavan has no power to take any steps that may be necessary to protect the interests of the tarwad by sale of a portion of the tarwad property where such sale may be necessary. It is impossible to lay down the rule that the karnavan is to manage according to the wishes of the majority of the members or that he should stay his hands if a certain proportion of the members be not willing that a part of the tarwad properties should be sold. Such a view is absolutely inconsistent with the theory of joint family. Mr. Justice Kunhi Raman Nair observes in the case above referred to that every anandravan is entitled to an opportunity to save the property and that therefore he is entitled to be consulted before it is sold. This of course does not show that the karnavan cannot sell if the anandravan is unable to save the property. It is altogether

1. (1889) 6 Tr. L. R. 49.

wrong in principle to lay down that the karnavan is bound to exhaust the resources of every anandravan in the tarwad before he is to sell any portion, however small, of the family estate. The karnavan should not of course sell where it would be enough to mortgage. That is the principle applicable to all persons having limited powers of disposition over property. But if a sale is necessary, is the karnavan bound to ask each junior member whether he can save the property? After all what is meant by saying that the anandravan is entitled to save the property ? Does it mean that he is entitled to save it by advancing funds to the tarwad so as to obviate a sale ? The karnavan certainly is not bound to borrow from an anandravan if the borrowing will only get the family into deeper trouble. If, on the other hand, a loan would be sufficient to tide over a crisis, there is no doubt that the karnavan should abstain from selling the family estate, whether a junior member is able to advance the loan or not. There is no doubt that the karnavan would be acting very reasonably in consulting the junior members of the family, and seeking their advice as to whether a sale of the family property is necessary. But if the Court comes to the conclusion that the sale is in fact necessary, it would be idle to say that it should be set aside simply because a particular junior member was not asked his advice about it. It is unwise to treat the members of a Malabar family as members of a corporation, each entitled to give a vote on every question of sale. In cases, therefore, where a sale is necessary in the interests of the family the sound rule and the only rule in accordance with the rules governing a joint family is that it is not necessary in law that the karnavan should consult the anandravan. But the Travancore Nair Regulation perpetuates most of the old features and provides that except with the written consent of all the major members no karnavan or other managing member shall sell tarwad property or lease it for a period of more than 12 years or mortgage it

with possession for a period of more than 2 years and S. 20 provides that no mortgage with possession of tarwad property for a period of 12 years or less shall be valid unless it is executed for tarwad necessity and with the consent of all the major members of the tarwad. Such necessity or consent may be presumed to exist if the transaction has the written consent of the senior anandravans of the karnavan's tavazhi and of every tavazhi collateral to the same, if any. S. 24 provides that where a karnavan creates a mortgage without any term or a lease for a period of twelve years or less without any premium therefor in respect of tarwad property or incurs a debt alleging the existence of family necessity such necessity shall as between the mortgagee, lessee or creditor on the one part and the members of the tarwad who have not assented to the mortgage, lease or credit on the other part be presumed to have existed, if the mortgagee, lessee or creditor after using reasonable care to ascertain the existence of such necessity, has acted in good faith. S. 21 provides that no debt contracted by the karnavan or other managing member shall bind the tarwad unless it be for tarwad necessity.

38. The karnavan must have power to sell where the sale though not necessary is manifestly a transaction beneficial to the family. Suppose for instance lands at a distance from the family house, which it is difficult for the family to cultivate, are sold by the karnavan, to find funds to buy other lands equally good or better nearer home which the family may easily look after and manage ; could it be held that such an act would be invalid unless the assent of all his anandravans or of a majority of them is obtained? It would not conduce either to the benefit of the Malabar tarwads or to easy management of their affairs to lay down a rule that the validity of a sale is not to be tested by the principle that governs all other acts of the manager.

39. The old rule denying the manager of a family all rights to alienate immoveable property, whether it belonged

to the whole family or was his separate property, is no longer enforced in the Mitakshara school, or indeed anywhere else in India. It is doubtful whether it was considered legally obligatory in Malabar at all. The passage quoted by Mr. Moore from the Vyavahara Samudram evidently only refers to Brahmins, because the son of the alienor, amongst others, is required to be present which could not be required in the case of one following the Marumakkathayam Law as the son has no right whatever to the property of the father. It moreover treats the presence of people of pure caste, the scribe of the king, and people connected with the parties as also requisite to validate the sale. According to Major Walker, " one of the caste of the Jenmkar, one of his near relations or kindred, the heir, a person on the part of the Raja or sovereign who must be apprised of the transaction, the person who draws up the Karanam or deed, and the Desavali or chief of the village or district—all these must be present. " [1] It is obvious that their consent is not necessary to give validity to the transaction. These passages only mean that a sale of jenm was treated as a transaction of a very serious nature and was undertaken only with the consent of the persons named. But no rule of a binding nature is intended to be laid down. A jenm sale was ordinarily carried out in a solemn manner in the presence of the whole family and kindred in the family house. The ceremony almost partook of the nature of a religious function. Water was poured into the hands of the buyer—an emblem ordinarily of gift. But this really throws no light on the legal question we are discussing. As a matter of fact, though the whole family would generally be present at the sale, all the members seldom sign the deed, but only the karnavan and the senior anandravan. Hence we find it is sometimes laid down that the signature of the senio

1. Major Walker's Report on the land tenures of Malabar (1801).

anandravan is necessary for a valid sale [1]. It may be noted that the Sudder Court say that where the anandravans are all under age, the sale will be valid if shown to be for the benefit or necessity of the family. It was very early laid down, however, by the Provincial Court of the Western Division that the senior anandravan's signature is not necessary, and a deed executed by the karnavan alone in the presence of the family and without a dissentient voice was valid [2]. And Mr. Holloway as Sub Judge, Calicut held that in order a sale may be valid, either the consent of the anandravans should be procured or it must be shown that the alienation was for a proper purpose and for common benefit [3]. This, it is submitted, is the sound rule. The assent of all the junior members will of course validate any alienation whatever the purpose may be; for all the joint owners of the property may deal with it as they choose. In the absence of ich assent, an alienation by the karnavan is still valid if it be eneficial or necessary. In a subsequent case [4], however r. Holloway seems to have held that the anandravan's sent was necessary, though in a still later case [5] he again ems to have got hold of the right rule for he there says that e union of the son or anandravan is presumptive evidence at the sale was made for the family purpose, thus bringing it the fact that the purpose is the thing really to be looked . So far as the highest Court, namely the Sudder Court was ncerned, it held until Mr. Justice Holloway came to the igh Court that the signature of the senior anandravan was cessary Whether that was sufficient or whether the conent, though not the signature of the other junior members so was required, and whether it was necessary to show that e sale was for a proper purpose, is not quite clear from the lings accessible to us.

1. Vide A. S. No. 5 of 1845 Sudder Court, and Proceedings of the Sudder urt, dated the 28th April 1860.
2. A. S. 70 of 1816.
3. A. S. 282 of 1855.
4. A. S. 137 of 1858 Tellicherry.
5. A. S. 169 of 1862.

40. In *Itti* v. *Kopashon Nair* [1] Scotland, C.J. and Strange, J observe that the "sale of family property in Malabar requires that the senior anandravan should if *sui juris* concur in the conveyance" that is to say be a party to it. This was, however, *obiter*, for the question was whether the karnavan might singly execute an othi document, and the learned Judges held that he could. In *Kondi Menon* v. *Ahammada* [2] Frère and Holloway, JJ. decided that all the junior members need not join in execution of a deed of sale. They say "all that is necessary is that the sale should be made with the assent, expressed or implied, of all the members of the tarwad and the karnavan and the senior anandravan if *sui juris*, should join the deed of sale. Such assent will be implied where, as in the present case, the sale is found to have been for the benefit of the family. Here the District Munsif and the Civil Judge have also found that the karnavan and the senior anandravan executed the deed. Such execution is *prima facie* evidence of the assent of the whole family : the onus of proving their dissent rests on those who deny their assent" According to this decision, the requisites of a valid sale are that all the anandravans should assent to it, and that the senior anandravan should join in the execution of the document. Though the senior anandravan's joint execution of the deed is presumptive evidence of the assent of the other anandravans [3], such presumption may be rebutted, and if so, the sale will be invalid. The purpose of the sale consequently becomes immaterial for if all the members join the sale must be valid, whatever the purpose may be ; and if any dissent the sale is invalid, notwithstanding the purpose may be a proper one. The Learned Judges observe that from the fact of the sale being for the benefit of the family,

1. (1862) 1 M. H. C. R. 122. 2. (1862) 1M. H. C. R. 248.

3. *Kombi Achen* v. *Lakshmi Amma* (1882) I.L.R. 5 Mad. 201, *See* also *Meloth Kannan Nair* v. *Kammaran Nair* (1913) I. L. W. 102 at p. 109 : 22 I. C. 609.

the assent of the other junior members may be implied. But it apparently has no other effect. It will be noted that this is not in accordance with the view propounded by Mr. Holloway as Sub-Judge where he held that where the anandravan's assent is not proved, the sale would be valid if it be for a proper purpose and for the common benefit. [1] In *Raman* v. *Mutoren* [2] one of the propositions laid down in *Kondi Menon* v. *Ahammada* [3] is denied. Mr. Justice Holloway was a party again to this decision, and he laid down in conjunction with Phillips, J. that the signature of the chief anandravan is not essential and that the assent of the junior members may be proved by other means as well. In the next case, *Koran Nayar* v. *Chanda Nayar* [4] to which again Mr. Justice Holloway was a party, a very different rule is laid down. The learned Judge deals with the question at some length, and he once more makes the purpose of the sale the point of the question. The Court said "it is the unquestionable law of Malabar that such (tarwad) property is inalienable ; that the eldest member holds it for the support of the younger members of the family. It is equally clear that on the establishment of adequate family necessity, alienation will be upheld ; but it lies on the purchaser to make out with abundant clearness that the purpose was a proper one." Later on, "in this particular case, therefore, it is not strictly necessary to deal with the opinion expressed by the Munsif as to the signature by the next senior member. As, however, the effect of such signature does not seem to have been very clearly apprehended, it would be well to make a few observations upon it. *Prima facie* it lies on the purchaser of family property to show that the alienation was made for proper purposes. The assent of the senior anandravan is some evidence that the purpose was proper and may have more or less effect upon the conclusion according to the circumstances of the case. Such

1. A. S. 282 of 1855
2. (1863) 1 M. H. C. R. 359.
3. (1862) 1 M. H. C. R. 248
4. (1867) 3 M. H. C. R. 294.

signatures, however, may by no means prevent the dissentient members from showing that both the karnavan and his apparent successor have really violated their duty. It would, however, render it unquestionably difficult to give relief against *bona fide* purchasers not affected with notice. At the same time the state of Hindu families is well known, the consulting of all the members is so easy, that it would perhaps not be difficult to conclude that there is an obligation upon the purchaser to inquire, and that he would be affected with notice by much slighter evidence than a purchaser in other countries. The reason for requiring the assent of the member next in age is the supposition that at all events he is interested in guarding in its entirety the property of which he is to succeed in management. Where, however, as in the present case, he as well as the karnavan belongs, to the branch improperly benefitted, the reason of the rule no doubt fails, and little or no weight ought to be attached to his junction." There is no trace in this decision that the assent of all the anandravans is necessary, the sole principle laid down being that the purpose of the sale must be such as to justify it in law. The assent of the senior anandravan whether evidenced by his joining in the execution of the deed or not is relevant only as raising a presumption more or less strong according to the circumstances of the case that the purpose is a lawful one. In *Varanakot* v. *Varanakot* [1] where the question was how far a decree passed against the managing member was binding on the other members of the tarwad, the Court (Kernan and Forbes, JJ.) dealing with the status of the karnavan, lost sight of the propositions laid down in the above case and observed as follows :—

"Almost the only restraint on him in such management is that he cannot alienate the lands of such tarwad except with the assent of the senior anandravan, or, in certain

1. (1880) I. L. R. 2 Mad. 328.

circumstances, of others of the anandravans." It does not appear that *Koran Nayar* v. *Chanda Nayar* [1] was brought to their Lordships' notice. The question under consideration was very different from the one we are now discussing. The dictum is therefore hardly entitled to much weight in the decision of the question. In *Tod* v. *Kunhamod Hajee* [2] Turner C. J. and Muthuswami Iyer, J. put the karnavan on the same footing as the manager of a Mitakshara family. As to his powers of alienating family property, the learned Judges say :—

" While equally with the manager of a joint Hindu family, he is incompetent to alienate the estate without the consent of the other members of the tarwad except to supply the necessities of the tarwad or to discharge its obligations, he can not only singly make leases at rack rents ordinarily for a term of 5 years for the cultivation, but leases with fines repayable on the expiry of the terms in the nature of mortgages (kanoms) and mortgages (othi) in which little more than a right to redeem may be left to the family." This is in consonance with the view laid down in *Koran Nayar* v. *Chanda Nayar* [1]. In *Kombi* v. *Lakshmi* [3], and in *Vasudeva* v. *Narayanan* [4] in which the question was similar to that in *Varankot* v. *Varankot* [5] observations similar to those made in that case are made by Innes and Muthuswami Iyer, JJ. They are open to the same comment as those in *Varankot* v. *Varnakot* [5] The next case in which the question really arose for decision was *Kalliani* v. *Narayana* [6]. The facts do not clearly appear from the report. The Court (Muthuswami Iyer and Hutchins, JJ.) laid down that the assent of every junior member is not essential to validate a sale. They say: " In our opinion the factious or capri-

1. (1867) 3 M. H. C. R. 294.
2. (1881) I. L. L. 3 Mad. 169.
3. (1881) I. L. R. 5 Mad. 201.
4. (1882) I. L. R. 6 Mad. 121.
5. (1880) I. L. R. 2 Mad. 328.
6. (1885) I. L. R. 9 Mad. 266.

cious dissent of a single anandravan ought not to be allowed to invalidate a sale made in pursuance of the decision of the family conclave, and which was either absolutely necessary, or the most reasonable and prudent arrangement for the protection of the other family property". Their Lordships asked the lower Court for findings on three questions : (1) whether the sale was necessary; (2) whether the plaintiff openly opposed it ; (3) whether the plaintiff's opposition was reasonable or merely frivolous and factious. In the particular case apparently most of the members had agreed to the sale, and the Court was considering the question whether every anandravan's assent was essential. But we do not understand the learned Judges as laying down that a sale to be valid must be in pursuance of the decision of a family conclave or made with the assent of the majority of the members. In this view, no doubt, the 3rd issue sent down would be unnecessary. *Koran Nayar* v. *Chanda Nayar* [1] is not re-ferred to in the judgment, while *Kondi* v. *Ahammada* [2] and *Ramen* v. *Mutoren*. [3] are referred to. The case cannot be said to depart from the propositions enunciated in *Koran Nayar* v *Chanda Nayar*. [1] In *Nanu Menon* v. *Raman Menon* [4] Subramania Iyer J. quotes the above case as authority for the proposition that "under certain circumstances the power to transfer even by way of sale is part of the powers of a manager like the karnavan." And the learned Judge adds that this proposition cannot be denied. In *Moidin Kutti* v. *Beevi Kutti Ummal* [5] a conveyance of tarwad lands by the senior members of a tarwad as the result of a compromise was upheld, as against the junior members who impeached the conveyance. Thus from 1867 when *Koran Nayar* v. *Chanda Nayar* was decided, whenever the Madras High Court had occasion to consider the question directly the tendency of the Court has been in favour of holding that an absolute sale is valid

1. (1867) 3 M. H. C. R. 294.
2. (1862) 1. M. H. C. R. 248.
3. (1863) 1 M. H. C. R. 359.
4. (1896) I. L. R. 20 Mad. 51.
5. (1894) I. L. R. 18 Mad. 38.

when it is beneficial to the family or necessary to protect its other property, although occasionally in cases where the question did not arise, observations have sometimes been made to the effect that the assent of some or all of the anandravans is necessary to validate a sale. A permanent alienation or any transaction which in substance though not in form amounts to an outright transfer of the right of the tarwad must be treated on the same principles as an absolute sale. [1].

41. As already stated the assent of the anandravans is not required for the validity of mortgages effected by the karnavan although in earlier cases language is sometimes used similar to that employed by Mr. Wigram that the implied assent of the anandravans is necessary in such cases also [2]. As already pointed out the proposition really amounts to nothing more than that the mortgage should be a proper one either beneficial or necessary in the interests of the tarwad. There is no justification in ancient practice or in any analogy derived from the Mitakshara Law for the view that the assent of the anandravans is required in such cases. The practice of requiring the assent of the tribe, kindred and of the sovereign was confined to cases of absolute sales. The usage in Malabar has rather been in favour of allowing the karnavan to execute kanom and othi mortgages and leases singly [2]. One cannot help thinking that the Travancore rule that mortgages for a term like absolute sales require the assent of the junior members is really not of native origin at all. It is, on the other hand, the result of the application of the ideas of the English Law which treat mortgages as a species of alienation. So far as the British Courts are concerned, the question may be regarded as set at rest by the decision in *Tod* v. *Kunhamod Hajee* [3].

1. *Tod* v. *Kunhamod Hajee* (1881) I. L. R. 3 Mad. 169.

2. *Ib Ahmood Kutty Hajee* v. *Koonhum Bi* ; A. S. 5 of 1845 (Sudder Court) ; *Moideen Kutty* v. *Mucatchy Coonjee* S. A. 38 of 1852 (Sudder Court). Strange's Manual p. 97 (2nd Ed.)

3. (1881) I. L. R. 3 Mad. 169

The question as to the onus of proof does not require more than a passing notice. It does not depend upon the usage of Malabar or any principle of Malabar Law. The Courts are not bound to, and do not administer, the rules of evidence that might have prevailed in the country before the British Courts of justice were introduced. Morever there is in reality no reason why a different rule should be applied in transactions entered into by the manager of a Marumakkathayam family from what would admittedly be applicable if the question arose with reference to the acts of the manager of a Mitakshara family. The rule that the onus must primarily be on the creditor to show that a debt contracted by a manager, whether it be a simple debt or mortgage debt, is one binding on the whole family. is a sound one based on general principles applicable alike to England and to India. And it is impossible to see any valid ground for the theidistinction made by the Travancore Court between simple debts and mortgages without a term on the one hand, and mortgages with a term on the other hand. Mr. Wigram strongly urged that the Travancore rule is the correct one. One entirely fails to see any reason for the plea except that in Malabar tarwards the individual members have no right to compulsory partition. This is rather a reason for holding that the onus primarily ought to be on the creditor, for as pointed out by Kunhi Raman Nair J., in *Krishnan* v. *Ayyapoo* [1] the relationship between the members of a Marumakkathayom family is often very remote and the interests of the karnavan conflict with his duty to the tarwad. A creditor dealing with such a person may fairly be expected in the first instance to show either that the loan advanced by him was in fact used for purposes binding on the family, or that he bona fide believed that it was required for such a purpose. It is not sufficient for the alienee to show that he made inquiries of the karnavan and was satisfied by statements made

1. (1889) 6 Tr L. R. 49.

by him as to necessity [1]. In *P. Kunhamed Hajee* v. *P. Kuttiath Hajee* [2] the rule throwing the onus on the creditor was held to be applicable to all cases and the point has not been seriously disputed since. The weight of the onus may no doubt differ according to the circumstances of each case and where members other than the karnavan also assent to the transaction, onus may be shifted on to the anandravans that question it [3]. In A. S. 103 of 1898 the Court laid down the rule that when all the adult members were parties to a mortgage instrument, and the transaction is afterwards questioned by those who were minors at the time, the burden is on the minors to show that it is not binding on the family [4].

43. The inference that is to be drawn from the assent of the junior members is not a matter of law but one of fact entirely. Whether in a particular case, the Court should draw the inference would depend upon the circumstances, whether the assenting members belong to the same branch or to different branches, whether they personally benefit from the transactions and the relationship of the members not consenting to the members that consent. The weight of such joinder will have to be considerably discounted if a dissent by any of the members is proved. In the case of sales, if the rule laid down in *Kalyani* v. *Narayana* [5] is the right rule, the onus would lie on the purchaser not only of showing that the sale is beneficial or necessary but also that the opposition is unreasonable and wrongheaded. From another point of view also dissent may throw an additional burden on the alienee. In the case of the alienee it is not always necessary to prove actual necessity; it is

1. *Koran Nair* v. *Chandan Nair* (1867) 3 M. H. C. 294, 36 M. L. J. 630.

2. (1879) I. L. R, 3 Mad. 169.

3. *See* Appeal 103 of 1898

4. *See also* S. A. 850 of 1890, A. S. 77 of 1895, A. S. 60 and 132 of 1895 and S. A. 1597 of 1918 and S. A. 2168 of 1918.

5. (1885) I. L. R. 9 Mad. 266.

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sufficient if inquiry as to necessity is made out. It may be that the assent of a large number of adult members of the family may satisfy that test. Express dissent should certainly require, as a matter of common prudence and therefore as a general rule, a closer inquiry into the facts. Assent being merely evidence of necessity (unless all the members assent) the assent of any number of them cannot convert that which is not a necessity into a necessity.

CHAPTER VI.

REPRESENTATION IN SUITS AFFECTING THE TARWAD.

44. General rule—Anandravan's right to sue in exceptional circumstances—basis of. 45. Anandravan's right to sue—further discussion of. 46. Estoppel. 47. Rule in contested suits by or against karnavan. 48. Rule in Travancore. 49-50. Karnavan—when sued as such. 51. Karar restricting power—effect of. 52. Exparte Judgments and dismissals for default—effect of.

44. In A. S. No. 120 of 1862 Mr. Justice Holloway remarked "a Malabar family speaks through its head and in all Courts of Justice, except in antagonism to its head, can speak in no other way." This remark is cited with approval in *Vasudevan* v. *Sankaran* [1]. In *Nambiatan Nambudiri* v. *Nambiatan Nambudiri* [2], a junior member of a Nambudiri Illam who was in *de facto* management of the bulk of the Illam properties sued for redemption making the *de jure* karanvan, 2nd defendant in the suit. The latter objecting to the suit, the Court held that the suit ought to be dismissed. Suits brought by junior members to set aside alienations by the karnavans and to recover possession of the property alienated for the benefit of the tarwad have been recognised for a long time. There is some conflict as to the precise nature of such a suit. In *Moidin Kutti* v. *Krishnan* [3], Mr. Justice Kernan thought that the individual members of the tarwad, as regards tarwad property had no rights vested in them separate from the tarwad, and that it was the tarwad alone as a body that could sue; on the other hand, Mr. Justice Muthuswami Iyer thought and in this opinion Mr. Justice Brandt concurred, that each individual member had a right, a separate right to see that the family property was not wasted by the karnavan.

1. (1896) I. L. R. 20 Mad. 129 at 133.
2. (1864) 2 M. H. C. R. 110.
3. (1887) I. L. R. 10 Mad. 322.

In *Byari* v. *Puttanna* [1] the nature of the suit is slightly differently stated by the same learned Judge sitting with Handley, J. It is there said. " If the sale by Mahalinga and Putta can be set aside by Mani and her son in its entirety, it can only be done by them on behalf of the family and for the purpose of recovering the property for its use. " On the other hand in *Soopi* v. *Uppathumma* [2] it was held that though a suit brought to set aside an alienation may be for the benefit of the tarwad, the tarwad cannot be considered to be party plaintiff in the suit. It was accordingly held that a dismissal for default did not prevent the other members of the family from suing. The right view to take consistent with these decisions would seem to be : Each individual member has got a right to sue in the name of the tarwad for the purpose of conserving the property wrongfully alienated by the karnavan. If the suit goes to trial and is decided on the merits, at any rate when the other members are parties the tarwad is bound but the tarwad is not responsible for the default of the junior member. What is affected by the default is only his individual right. Mr. Justice Seshagiri Iyer seems to go too far when he says that there is no question of representation in such suits [3]. The same might be said of suits brought to declare that an adoption of an heir is invalid or that a decree against the karnavan is not binding. These, however, do not exhaust the kinds of suits that might be brought by the anandravans. In *Raja of Arakal* v. *Cheria Kunhi Kannan* [3] the opinion is expressed that the junior members can maintain a suit on behalf of the tarwad when the karnavan is submitting to an infringement of the tarwad right by a stranger. In *Anantan* v. *Sankaran* [4] the junior members of a Malabar Tarwad brought a suit for possession against the alienee from the senior anandravan who had been

1. (1839) I. L. R. 14 Mad. 38.
2. (1909) I. L. R 33 Mad 31.
3. *Raja of Arakal* v. *Cheria Kunhi Kannan* (1915) 29 M. L. J. 632.
4. (1890) I. L. R. 14 Mad. 101.

appointed manager by the karnavan. It was objected that the suit brought by the junior members was not maintainable. Their Lordships say in reply: " the karnavan is included as a defendant in the suit and as he has failed to sue till the period of 12 years has almost expired, we are of opinion that the suit by the junior members cannot be validly objected to."

45. The principle that ordinarily the karnavan alone can sue was applied in *Cheria Pangi Achan* v. *Unnulachan* [1] where a junior member sought to enforce the terms of a family karar against a person appointed to manage under the karar. The learned Judges held that in the absence of a special provision in the karar conferring a right of suit on the junior members the proper person to enforce the karar is the karnavan. In so doing Mr. Justice Sadasiva Iyer observed "unless the karnavan himself is disabled from suing to recover possession of or obtain other relief regarding the tarwad property an anandravan cannot be allowed to sue on behalf of the tarwad." Though it may be a sound rule that in all cases where the karnavan is disabled from suing the other members are entitled to sue to enforce the rights of the tarwad, the converse may not be true. The case above noted *Anantan* v. *Sankaran* [2] was not a case in which the karnavan had disabled himself from suing. In *Karunakara Menon* v. *Kutti Krishna Menon* [3] the learned Judges Oldfield and Phillips, JJ. while holding that the junior members are not entitled to sue for account against an agent appointed by the karnavan, are not apparently prepared to go to the length the words of Mr. Justice Sadasiva Iyer would seem to take. It might be open to argument if redemption suits should not also form an exception to the rule. *Nambiatan Nambudiri* v. *Nambiatan Nambudiri* [4] above referred to is against this contention but that

1. (1916) 32 M. L. J. 323 : 38 I. C. 13.
2. (1890) I. L. R, 14 Mad 101.
3. (1917) M. W. N. 342 : 38 I. C. 666. 4. (1864) 2 M. H. C. R. 110.

case was before the Transfer of Property Act. S. 91 of that Act confers the right to redeem on all persons interested in the property. The ratio of the decision in *Karattole Edamana* v. *Unni Kannan* [1] where one of the joint trustees was held entitled to redeem independently of and without reference to the other trustees on the strength of this section, would seem to be in favour of the recognition of the exception. On the other hand in a recent case [2] Spencer and Bakewell, JJ. held that they did not form exceptions to the general rule. The same is the view of the Travancore High Court in *Padmanabhan Raman* v. *Raman Narayanan* [3] but they recognise that the rule is not an absolute one and where the interests of the tarwad as a whole demand it the suit may be allowed [4]. One of the exceptional circumstances recognised is collusion between the mortgagee and the karnavan [5]. In *Kalliani Amma* v. *Sankaran Nair* [6] it was held that the junior members might file an appeal when the karnavan who had filed the suit had died and the successor was interested in the defendants and thus did not care to file an appeal. In *Parameswaran Nambudripad* v. *Sankaran* [7] the point was raised as to whether in a case in which the karnavan makes an unauthorised alienation but the complaint is not that he has committed fraud on the family but that fraud has been perpetrated on him, the members of the family have a cause of action distinct and separate from the karnavan. Mr. Justice Sadasiva Iyer was inclined to hold that they had not. He thought that it was case in which the karnavan himself could give a discharge within the meaning of S. 7 of the

1. (1903) I. L. R. 26 Mad. 649 (F. B.)

2. (1919) *Soopi* v. *Mariyamma* (1920) I. L. R. 43 Mad. 393 : 38 M.L.J. 207.

3. (1901) 18 Tr. L. R. 31 (F. B.)

4. *Narayanan Parameswaran* v. *Vikraman Mathevan* (1913) 30 Tr. L. R. 67.

5. *Raman Krishnan* v *Raman Ayyappan* 3 Tr. L. J. 179 (F. B.)

6. (1918) 10 L. W. 220 : 52 I. C. 688.

7. (1914) M. W. N. 689.

Limitation Act; at any rate, he says, in such a case the karnavan and the senior anandravan sufficiently represent the family to give a discharge. Mr Justice Napier concurred on the second point but hesitated to concur on the first as he thought that the cause of action of the family was distinct from that of the karnavan. So far as the individual parties to the transaction are concerned, the transaction would be voidable, but as against the family the transaction in so far as it is in excess of the powers of the karnavan, whatever the reason by which it is so in excess, would be void and their cause of action is therefore independent of that of the karnavan. [1] The right of the individual members in all these cases is in effect the right to represent the family because the proper channel of representation is barred. Where there is a proper channel for representation in the person of a succeeding karnavan, the right of the other members to represent the family ceases and the only person that can bring the suit is the succeeding karnavan. The right will revive if he acquiesces and not otherwise. For the purpose of limitation, the right is considered a joint right and if there is a person who is able to give a discharge, the right of all will be barred under S. 7 of the Limitation Act, though there are minors when the cause of action accrued. On the view taken in *Parameswaran* v. *Sankaran* [2] which has since been followed [3] there would be a person able to give discharge within the meaning of the section if there is one adult member who is not a party to the transaction sought to be impeached. As said above, though the tarwad takes the benefit of the litigation and may be precluded from asserting the same right when the suit has been tried on the merits, the default of individual members will not affect the family. To this extent, this kind of suit differs from a suit by the karnavan. The ground on which

1. *Unni* v. *Kunchi Amma* (1890) I. L. R. 14 Mad. 26.
2. (1914) M. W. N. 689.
3. S. A. 641 of 1917.

individual members of the family are not permitted to sue on behalf of the family is, that it would be substituting the discretion of the junior member for that of the karnavan to whose care the administration of the family affairs is committed [1]. This view, however, looks at the question too exclusively from the point of view of the karnavan and has the further defect of looking upon the tarwad as a corporation which it is not. [2] The best way of looking at the question is that suggested in *Kuchan* v. *Moorthi* [3] (a case of trustees) *viz.* where the cause of action is dependent on an antecedent act on behalf of the tarwad, a suit brought by the junior member should fail but where there is no question of defect in the cause of action the matter is one entirely within the discretion of the Court whether the suit should be dismissed, or whether a decree should be given to the family. Where a *de facto* manager sued making the karnavan party defendant and the latter did not object, it was held that the suit was properly laid [4]. Ordinarily, if the karnavan objects the suit would be dismissed but in a proper case the power of the Court to give relief should be recognised.

46. However that may be, where the family puts forward a particular member as its manager, it will certainly be estopped from saying afterwards that any proceeding taken against him is not binding against it. Again on the principle of *Kishan Prasad* v. *Har Narain Singh* [5] where contracts are entered into with individual members without disclosing that they are acting on behalf of the family, it would be open to those members to maintain the suit in respect of such contracts though the consideration may have flown from the family.

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1. *Cheria Pangi Achan* v. *Unnaluchan* (1916) 32 M. L. J. 323.

2. *Raja of Arakal* v. *Cheria Kunhi Kannan* (1915) 29 M. L. J. 632. *Moiden Kutti* v. *Krishnan* (1887) I. L. R. 10 Mad. 322.

3. (1910) I. L. R. 34 Mad, 406 : 20 M. L. 951 : 7 I. C. 422.

4. S. A. 612 of 1902.

5. (1911) I. L. R. 33 All. 272 (P. C.)

1949. 2 MLJ 443

47. Passing on to suits by or against karnavans, after a long period of doubt and vacillation, in which many distinctions were made, between cases where the karnavan sued or was sued as such, and where he was sued in his individual capacity, where he himself brought a suit and where he was only a defendant, where the object of the suit was to recover a debt and where it was to recover some property belonging to the family, and also between absolute and qualified representation, the Full Bench laid down in *Vasudevan* v. *Sankaran* [1] that a decree made in a suit in which a karnavan is sued in his representative capacity and which he honestly defends, is binding on the other members of the family not actually made parties. The law is stated to be the same whether the karnavan is the plaintiff or defendant [1]. Though opinion is expressed in various parts of the judgment that fraud or collusion is the only ground on which a decree against the karnavan can be successfully impeached, on careful examination it will be found that it is by no means confined to those cases. That conclusion is certainly not involved in the answer to the reference. The only point decided is that where the suit is against the karnavan in his representative capacity and he defended the suit honestly the decision passed would bind the Tarwad. The word 'honestly' implies according to Chief Justice Collins that the karnavan acted in good faith and what he believed to be in the interests of the tarwad. According to Mr. Justice Subramania Iyer the decree would be binding " unless it was shown that there was fraud or collusion or anything of that sort, or that the Court was cheated into believing that the case was fairly fought or fairly represented whereas in point of fact it was not." Mr. Justice Shephard says in one place that whenever the karnavan sues or is sued in his representative character, the tarwad is bound, cases of fraud or collusion alone being excepted, but elsewhere he observes

1. (1897) I. L. R. 20 Mad. 129 (F. B)

"distinctions founded on the nature of the right or the way in which it comes to be litigated may be material in considering whether the karnavan did really represent the tarwad and honestly represent it." One thing is clear that the word fraud is used in a wider sense than that in which it is used in connection with ordinary judgments. The fraud need not be the fraud of the other side but may be of the karnavan himself. Another thing to be noticed is that the case does not cover cases of *ex-parte* judgments or judgments on default. The opinion of Mr. Justice Shephard would seem to be, that it is open to the members of the family to show that the karnavan though he was sued in his capacity as karnavan, did not in fact represent the family. This would bring the case into line with decisions in cases of trust. Their Lordships of the Privy Council lay down in *Prosonno Kumari Debya* v. *Golabchand Baboo* [1] that before holding the judgment against a trustee to be *res-judicata* against the succeeding trustee the court must satisfy itself that proper issues were raised and determined. If he put forward the appropriate defence and honestly defended the suit, the judgment would bind the family though there might be some negligence in the conduct of the suit. [2] In cases where the action is brought to enforce an obligation incurred by the karnavan or to enforce the consequences of a default of his, the dividing line between fraud and failure to plead would generally be hard to delineate. It would certainly be advisable in such cases for the stranger to make the senior anandravan or anandravans parties to the suit. The failure to raise which appropriate defence would make the case, a case of non-representation of the family is not a question capable of a comprehensive answer, as it would largely depend on the facts of each case. Mere repudiation of his position as karnavan or a refusal to

1, (1875) L. R. 2 I. A, 145.

2, *Madhavaya* v. *Kerala Varma* (1902) 13 M. L. J. 68 ; also S. A. 971 of 1902.

act on behalf of the family may not affect the case if in fact he is sued in his representative capacity and fights the family cause honestly [1]. Failure to put forward a contention owing to an error of judgment on the part of the karnavan or his legal adviser or mere negligence not amounting to gross negligence or fraud can certainly not affect the binding character of the judgment [2]. The terms of the Full Bench reference and the answer would seem to preclude in cases covered by the reference, that is to say, where the karnavan has appeared and defended the suit, attack on the ground of gross negligence which does not amount to fraud or to a practical non-representation of the family. In *Thenju* v. *Chimmu* [3] the karnavan chose to accept the challenge of oath by the plaintiff and their Lordships held that in the circumstances of the case, it amounted to gross negligence on his part and the decree was not binding on the family. It is observed there :—"When a karnavan fails to utilise the means of proof at his disposal, and loses the tarwad property negligently or credulously trusting to the oath of the opposing defendant, the anandravans are not bound by his act and precluded from showing that it was negligent, even if not, fraudulent, and therefore prejudicial to the interests of the tarwad, which it was his duty to protect with ordinary diligence. His position like that of a Hindu father is fiduciary, though his acts are binding on the anandravans as those of the head of the family, until they show that such acts are in excess of his authority, or negligent, or fraudulent. A decree against him is binding on the tarwad, because it is a decree against the head or representative of the family, but his power as head of the family is a qualified power, qualified by his fiduciary position and the duties which by the usage of the district attach to such position. It is enough to say, that when fraud or breach of duty as karnavan is shown, his act

1. *Cf. Ambalam Pakkiya Udayan* v. *Bartle* (1911) I. L. R. 36 Mad. 418.
2. *Madhavaya* v. *Kerala Varma* (1902) 13 M. L. J 68.
3. (1884) I. L. R. 7 Mad. 413.

must be treated as a fraud upon his power, and as the karnavan's conduct was negligent, if not fraudulent, the decision against him in that suit, does not bind the respondents." How much of this is good law after the Full Bench decision is not clear. The case is referred to by Mr. Justice Shephard and is not dissented from ; on the other hand the conclusion arrived at in that case is assumed to be consistent with the opinion of the Full Bench. Unless the case is distinguished as a case of practically no defence, it is inconsistent with the Full Bench decision. Fraud on power, negligence, and breach of duty are not terms that necessarily connote absence of honesty. Another way this case may be viewed is as one of consent to foregoing a regular trial, to which considerations other than those applicable to contested suits would apply. In this view, the observations extracted above may be useful in the determination of the liability of the family on judgments on default or by consent. Where the karnavan is sued as such, the other members are in effect parties to the suit, and any objection relating to execution of the decree should be raised by them in execution under S. 47, C. P. C.[1] Objections to the validity of the decree cannot of course be raised [2].

48. The course of decisions in the Travancore High Court as stated by Sadasiva Iyer C. J. (as he then was) in *Mundan Raman* v. *Ramasubba Aiyan Kulathoor Aiyan* [3] is to allow a separate suit by the anandravans not only to set aside a decree on the ground of fraud and collusion, but also on the ground (a) that there was no consideration for the debt sued on and (b) that the debt was not contracted for tarwâd purposes and was a personal debt of the karnavan. In cases of the last description the conflict between interest and duty on the part of the karnavan is so great that the rule stated by the

1. *Kamal Kutti* v. *Ibrayi* (1901) I. L. R. 24 Mad. 658 ; *Marivittil Mathu Ammâ* v. *Cherukot* (1906) I. L. R. 30 Mad. 215.

2. *Sadindra* v. *Budan* (1885) I. L. R. 9 Mad. 83.

3. (1905) 21 Tr. L. R. 41.

Travancore High Court is likely to prove more just in the working than the narrower rule which the Madras decisions seem to suggest.

49. As stated above, before a decree is held binding, it is essential that the Court should be satisfied that the karnavan sued or was sued in his representative capacity. It must appear clearly on the pleadings or otherwise that he represented the family [1] although it is not necessary that it should be expressly so stated in the decree. On this point the decisions prior to the Full Bench case have not lost their authority.[2] The nature of the claim itself may in many cases unerringly indicate the character in which the suit is brought. For instance, where the suit is brought to recover the tarwad property on the strength of the tarwad title or to enforce an admittedly tarwad claim, it is not necessary that there should be a further express statement in the pleadings that the action is brought in a representative character. In this respect generally, there is a difference between suits brought by a karnavan and those brought against him. It may well be that though the defendant alleged a tarwad title the plaintiff might merely seek to evict him personally or to recover damages from him personally or where the suit is on a contract entered into by the karnavan he might be merely seeking to enforce the claim personally against the karnavan. Therefore in such cases it is incumbent on the plaintiff to clearly indicate in what character he is suing him [3]. The mere fact that he might have got relief against the tarwad is no ground for holding that he did seek to get it. [4] Especially it would be so when as between the karnavan and the tarwad, the karnavan is guilty of a breach of trust. [5]

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1. *Ittiachan* v. *Velappan* (1885) I. L. R. 8 Mad. 484.
2. *Rayarappan Nambiyar* v. *Koyotan Chalile Veetil Kamaran* (1918) 35 M. L. J. 51. 3. *Appa Rao* v. *Venkatadri* (1907) 17 M. L. J. 197.
4. *Venkatakrishnayyar* v. *Kaveri* (1883) I. L. R. 7 Mad. 201 ; *Ittiachan* v. *Velappan* (1885) I. L. R. 8 Mad. 484 ; *Kultan* v. *Kalliani Amma* (1917) 6 L. W. 25 ; *Sankaran* v. *Parvathi* (1889) I. L. R. 12 Mad. 434.
5. *cf. Nagender Chunder Ghose* v. *Sreemulty Kaminee Dossee* (1867) 11. M.I.A.241 ; *Brij Bhukan Lal* v. *Mahadeo Dobey* (1875) L.R. 2 I A. 275 : 1 Cal. 133.

50. The description of the defendant by the name such as Valiya Nambiyar which indicates his position in the family is sufficient for inferring that he was sued as karnavan[1] . Similarly the junction of junior members describing them as anandravans [2] is sufficient indication of the intention to sue him in his representative character. Where a suit was brought to sell the tarwad property on a hypothecation executed by the senior male and senior female impleading them both as parties, that circumstance alone was held a sufficient indication of an intention to bind the family. [3] *Prima facie* a maintenance decree would be regarded as one got against the karnavan in his representative capacity [4] though there may be some doubt when the claim is only for arrears. The circumstance that the defendants were in fact the Karnavan and the senior anandravan was held not to suffice when the existence of the branch as such was not recognised by the plaintiff in the plaint [5]. In the case of suits for the recovery of debts, a statement that the debt is binding on the family being necessary in the plaint, if the family is sought to be bound, there would generally be very little difficulty in determining the nature of the suit. Once the view prevailed that all debts incurred by the karnavan should be held *prima facie* binding on the tarwad, but that is not the view now held. [6] In *Itliachan* v. *Velappan* [7] it was held that a decree against a karnavan could not be executed against the family property unless he was sued in his representative capacity even though the debt is found to be

1. *Krishnan Nambiyar* v. *Krishnan Nair* (1894) I.L.R. 18 Mad. 452 note.

2. *Itliachan* v. *Velappan*, (1885) I. L. R. 8 Mad. 484 (F. B.)

3. *Subramanyan* v. *Kali* (1887) I. L. R. 10 Mad. 355.

4. *Chandu* v. *Raman* (1888) I. L. R. 11 Mad. 378.

5. *Kunnappan Nambiar* v. *Ukkaran Nambiar* (1893) I L. R. 17 Mad. 214.

6. *Kutti Mannodiyar* v. *Muthan* (1881) I. L. R. 3 Mad. 288 ; *Kombi Achen* v. *Lakshmi Amma* (1882) I. L. R. 5 Mad. 201.

7. (1885) I. L. R. 8 Mad. 484 (F. B.)

for a binding purpose [1]. In *Manakal Velamma* v. *Ibrahim Lebbe* [2] it was however held that this view was opposed to the Privy Council decisions therein referred to. According to this case, whereas when the karnavan is sued as such the decree is binding against the tarwad unless the junior members are able to prove collusion or fraud, in a case where a decree is not so obtained, the creditor will have to show that the debt was incurred for a purpose binding on the family. [3] The Bombay High Court in a more recent case has held that whatever the conclusion that ought to be arrived at when there has been a sale, the court is not bound to direct the sale when the decree has not been passed against the manager in his representative capacity [4]. The question is not however one peculiar to Malabar tarwads and should follow the general course of decisions under the Hindu Law.

51. The question that may be considered in this connection is what is the effect of karars that restrict the power of management of the karnavan on his capacity to represent the family in suits. A karar that merely restricts the power of the karnavan to deal with the family property cannot have the effect of depriving him of the capacity to represent the family in suits. But a person who knows of a karar which practically deprives the karnavan of all his powers, will have great difficulty in persuading the court to hold that there was an honest and effective representation of the family in the suit. If in addition the suit is brought to enforce a transaction entered into by such a person and particularly if he was *ex-parte*, hardly anything more would be needed to make out a complete case of fraud.

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1. See *also Sri Devi* v. *Kelu Eradi* (1886) I. L. R. 10 Mad. 79.

2. (1903) I. L. R. 27 Mad. 375.

3. See *also Kuttan* v. *Kalliani Amma* (1917) 6 L. W. 25.

4. *Laxman Nilkant Pusalkar* v. *Vinayak Keshav* (1915) I. L. R. 40 Bom. 329.

In respect of transactions prohibited by the karar, the karnavan should *per se* be held disqualified to represent the tarwad and decrees against him should not bind the tarwad so far as at least parties who have notice of such incapacity are concerned. If the analogy of agency is applicable to the case of the karnavan, it may be argued that even if he ceases to be karnavan a person acting without notice of the termination of his authority should be protected. But the analogy between the position of an agent and that of a karnavan is not complete. The karnavan is so not by the volition of parties, but by law. His right to represent comes to him by status and when such status ceases, he must cease to have authority to act for the family, whether the stranger has notice or not ; or this anomaly might result that a karnavan though deposed by a decree of court could act to the prejudice of the family with strangers without notice of his deposition. It is the duty of the person acting with a karnavan to inquire whether he continues to be one and if the person in actual management is a different person that should be constructive notice to all persons of the fact of the cessation of the authority. The fact that a person is an agent would not give him authority to represent the principal in suits, and so far as suits are concerned therefore, if the person sued has not got the status, he cannot represent the family.

52. The next question is to what extent judgments *ex-parte* are binding against the family. In *Yusuf Sahib* v. *Durgi* [1] the view taken apparently is (though it cannot be said to be clear) that it is open to members of the family to show that the decree is wrong on the merits. The same view seems to be taken in *Subbammal* v. *Avudaiyammal* [2] as regards a Hindu widow. On the other hand in *Venkayya* v. *Subbarayadu* [3] the view taken is that the judgment

1. (1907) I L. R. 30 Mad, 447. 2. (1906) I. L. R. 30 Mad. 3.
3. (1907) 17 M. L. J. 160.

against a widow would not be binding against the revesioner if "she had reason to believe there was a good defence." *Ex parte* decrees stand on a different footing from decrees passed after contest. In suits decided after contest an impartial court which can be trusted to some extent to watch the interests of absent parties, comes to a conclusion after hearing the case for the family as honestly represented by the accredited representative of the family and the judgment might well be held to be binding [1]. But where the head of the family has left the field without contest though the action of the court if justified by the facts may bind, it would not seem to be right to give the decree a higher value, especially where innocent third parties are not concerned, than any other voluntary act or omission of the karnavan. The *ex parte* decision of the court may raise a presumption of accuracy and propriety in favour of the decree. In S. A. No. 1471 of 1912 the existence of a decree against the karnavan though *ex parte* was held to afford sufficient protection to the lender. He was not bound to go behind the decree and ascertain whether the decree debt was for a purpose binding on the tarwad. This does not preclude the position that the family may be allowed to show as against the decree holder that the karnavan had a defence to put forward if he was so minded. At any rate to the extent *Tenju* v. *Thimmu* [2] proceeds, the *ex parte* decree must be open to attack. If the plaintiff was a party to the original transaction and was aware of the infirmative circumstances and nevertheless got an *ex-parte* decree against the family, without giving notice to the other members of the family there is no injustice in holding the family not liable. Even in other cases, if the defendant was *ex parte* the plaintiff had a remedy in his own hands of making other members parties. If S. 11 Expl. VI C. P. Code

1. *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (1935) I. L. R. 29 Mad. 391 : 16 M. L. J. 307. (F. B.)

2. (1884) I. L. R. 7 Mad. 413.

applies to suits by karnavans the only defences open would be want of good faith and non-representation in fact, of the family.

53. It is an even more difficult question to say what is the extent to which a dismissal for default should bind the family. On the one hand, it may be argued that the family should be bound by the default of its representative; on the other, the analogy of class actions may be given for justifying the contrary conclusion. Under O. 9, R. 9 C. P. Code, it is only the plaintiff that is prevented from suing again. In *Kamalkutti* v. *Ibrayi* [1] followed in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* [2] it has been held that all members of the family are constructively parties to a suit by or against a Karnavan as such. In that view it may be said that in suits by Karnavans, all the members are party plaintiffs and as such are precluded from bringing a fresh suit. But that is begging the very question in issue. In the first place, *Kamalkutti* v. *Ibrayi* [1] goes too far, and the doubts of Shephard, J. about the correctness of the conclusion arrived at would seem to be justified. What the Full Bench case decided is, that the decree under certain circumstances binds the other members of the family. The authority of the Full Bench does not go to the extent supposed. At any rate the Full Bench decision as shown above does not preclude the conclusion that the decree is not binding in other circumstances than those set out in the Full Bench case. A minor is not precluded from bringing a suit to set aside a decree on the ground of the gross negligence of the guardian either by S. 11 or by O. 9, R. 9. C. P. Code The same reasoning would apply to the case of junior members of a Marumakkathayam or Aliyasanthana family. The only effect of holding them parties may be to prevent them from questioning the binding nature of the decree in execution. It is not open even to strangers to question the decree in execution. That can be done only in a separate suit.

1. (1900) I. L. R. 24 Mad. 658. 2. (1906) I. L. R, 30 Mad. 215.

54. As has been already seen, it is within the competence of the Karnavan to effect a compromise in respect of the doubtful rights of the family and a decree passed on that compromise will bind the family. The compromise decree will be open to all attacks to which a compromise would be open. If it is shown that in entering into the compromise he was acting in fraud of the tarwad or in ignorance of its rights, the compromise will not bind the other members.[1] In this matter the position of the karnavan is not in any way different from that of the manager of an ordinary Hindu family.

1. *Rayarappan Nambiyar* v. *Koyolan Chalile Veetil Kamaran* (1918) 35 M. L. J. 51.

CHAPTER VII.

THE KARNAVAN—HIS REMOVAL.

55. Karnavan—Ceasing to be so *ipso facto* and removal —Circumstances-Mental, moral and physical defects. 56. Misconduct and negligence—before attaining Karnavanship or in relation to other property--Effect of. 57. Criticism of decisions on the question 56. Passing over Anandravan, considered. 59—61 Imposing restrictions, propriety of.

55. The powers of the karnavan in the management of the family property have already been dealt with. It is proposed next to consider the circumstances in which he forfeits his right to continue in the office. The most frequent cause for removal is gross and continued mismanagement of the affairs of the family, but there are several other grounds which equally disqualify him for continuing in the office. Ordinarily, however bad he may be, he will continue manager until he is deposed by a decree of court. His postion is his birth-right and is not derived from the other members of the tarwad. He is not an agent appointed by them, though in some respects his powers and duties resemble those of an agent. Nor is he a mere trustee for them, himself having a proprietary interest in the family property though his position towards them is in many respects analogous to that of a trustee. All the other members of the tarwad joining together cannot remove him. If they want to remove him, they must resort to court which alone can remove him. There are cases, however, where the karnavanship may not at all vest in a person though he is the eldest male member of the family, or he may cease to be such by reason of certain supervenient causes *ipso facto* and without an order of the court removing him. For instance, where a person is an idiot or a lunatic the karnavanship will not vest in him, and similarly if he becomes

an idiot or a lunatic after succeeding to the karnavanship he will *ipso facto* cease to be karnavan [1]. Would the consequence be the same also in the case of other physical or moral disqualifications ? It is impossible to say that any particular moral defect or infirmity will work a forfeiture of one's status as karnavan so as to make it unnecessary to resort to the court to remove him, unless the infirmity is such as to completely deprive him of his intellectual capacity. Similarly in the case of physical defects unless they are accompanied by idiocy, it will be necessary to get a decree for removal. There are no religious considerations rendering a person suffering from any physical, intellectual or moral infirmity unfit for the office of karnavan. In fact there are no religious ceremonies which a karnavan as such is bound to perform directly, and in any case there is no warrant for the argument that capacity to perform religious ceremonies is a necessary qualification for the office of karnavan. Even so and notwithstanding the Caste Disabilities Act a person would on conversion or loss of caste vacate his office of karnavan; at any rate, he should be removeable from his position on that ground ; it is inconceivable how he could discharge his duties satisfactorily on a change of caste. Conversion may have wider effect and cause a severance from the family ; this matter has been already dealt with [2] . The rules of ordinary Hindu Law excluding a person from inheritance in consequence of physical defects which are supposed to make him unfit to perform religious rites for the benefit of deceased ancestors, do not apply to those governed by the Marumakkathayam system [3]. But it is undoubtedly open to the Court to remove a person from the office of karnavan for any physical infirmity if it is such as to incapacitate him from discharging the duties of his office. In *Kanaran* v. *Kunjan* [4] the Court removed a karnavan on the ground that

1. *Govindan Nair* v. *Narayanan Nair* (1912) 23 M. L. J. 706.
2. See Chap. II. 3. *Chandu* v. *Subba* (1889) I. L. R. 13 Mad. 209.
4. (1888) I. L. R. 12 Mad. 307.

he was blind. The blindness in that case was not congenital. The Judges (Collins and Wilkinson, JJ.) say: "We are of opinion that a blind man is not a fit person to be the karnavan of a tarwad and to permit a blind man to continue to occupy the post under such circumstances as those disclosed in this case would inevitably tend to ruin the tarwad." In the particular case the lower Court had found that in addition to being blind, the karnavan had been guilty of misconduct. It may be doubted whether blindness by itself would be sufficient to justify the removal of a person from the office. It is not difficult to conceive of cases where a blind man, especially where blindness is notcongenital, is thoroughly capable of administering the affairs of the tarwad. Dr. Ormsby in his outlines of Marumakkathayam Law states the proposition more cautiously. "A karnavan can only be removed by the decree of a competent * * * * court, if he is physically or mentally incapable of transacting its affairs." The question, therefore, will be, whether in consequence of the physical defect he is incapable of transacting the affairs of the tarwad. In some cases, as in the case of deaf and dumb persons, the presumption of incapacity may be practically irrebuttable. But the test is that laid down by Dr. Ormsby. This is apparently the view accepted in *Ukkandan* v. *Kunhunni* [1]. In that case Subramania Aiyar and Best, JJ. held that the karnavan does not vacate his office on his becoming blind, and accordingly a stranger to the tarwad could not resist a suit by him to recover possession of the tarwad property. It was for the members of the tarwad to get him removed if he was unfit to continue in his office. In *Chandu* v. *Subba* [2] leprosy was held not to be a ground disentitling a person to act as karnavan. Utter incompetence or gross negligence is stated in some cases as being sufficient to remove a person from management though there is no case in which he has been removed solely on that ground [3]. Extreme

1. (1892) I. L. R. 15 Mad. 483. 2. (1889) I. L. R. 13 Mad. 209.
3. *Varanakol* v. *Varanakol* (1880) I. L. R. 2 Mad. 328.

old age has been treated as a factor in judging the desirability of his removal [1]. In *Ukkandan Nair* v. *Unikumaran Nair* [2] Shephard and Subramania Aiyar, JJ. removed a karnavan on the ground that he had been convicted of murder. Their Lordships held that by the conviction he had become unfit to be the guardian of the minor members of the tarwad and to rule the domestic affairs of the tarwad. Their Lordships observe "the position of the karnavan requires him to be brought into intimate association with the members of the tarwad. He is the guardian of the minor children and in other respects is in the position of the father of the family. It would be monstrous for the court to compel the family to submit themselves to the authority of a man who had been convicted of murder especially a murderer of a member of the tarwad." In *Raman Nambiar* v. *Krishnan Nambiar* [3] intemperate habits of the karnavan were assigned as one of the grounds for his removal. In all cases in which the karnavan becomes unfit to discharge any of the important duties of the office, the members of the tarwad are entitled to have him removed. Although as already pointed out, a karnavan is not a mere trustee, there can be no doubt that he occupies a fiduciary position towards the other members of the tarwad, and that if he is unfit to fill that position he ought to be removed. In fact he may be said to be both a trustee and a guardian, in addition to being a co-proprietor with the other members. The fact that he is a co-proprietor will not relieve him of his responsibilities as a guardian and a trustee and the Court will remove him, if he cannot discharge those responsibilities. No hard and fast rule can be laid down as to the moral delinquencies which will entail his removal. The court will have to decide in each case whether they are so great as to render his continuance in the office unsafe. On the one hand, it ought to be remembered that the office is one which he by right and not by appointment by the

1. *Kunhanna Shetty* v. *Timmaju* (1914) 27 M. L. J. 60.
2. (1896) 6 M. L. J. 139.
3. S. A. No. 712 of 1877.

court, holds and the question which the court has to consider is not whether he is the fittest member of the tarwad to occupy the position, but whether it has been clearly made out that he is unfit to discharge the duties of a manager, trustee and guardian. At the same time it ought not to be forgotten that the junior members not being entitled to partition or even to call upon the karnavan to account, it is but right they should be entitled at least to see that the tarwad affairs are managed by a proper person. Courts should not hesitate to exercise their jurisdiction, when it is clear that the interests of the tarwad require the removal of the karnavan.

56. The chief difficulty is in deciding what kind or amount of mismanagement is sufficient to justify the removal of a person and there is great difference in the standards adopted by different Judges. In the earliest case on the subject, *Cheru Ammu* v. *Ronara Nambiar* [1] the Provincial Court of the Western Division observed "the courts of Justice can only interfere in the event of its being proved that the karnavan or the senior has shown himself unworthy of such management from incapacity or gross extravagance and inattention to just claims and wants of the junior members when he may be set aside and another of the seniors put in his place." The decision of the Provincial Court was confirmed on appeal by the Sudder Court in A. S. No. 28 of 1814 [2]. In a later case Mr. Holloway as Civil Judge said, "It is quite clear that such removal will be ordered where the conduct which he has pursued shows that the family affairs cannot be safely left in his hands."—a safer and a more correct test. The misconduct alleged in the case was setting up title in himself in family property with a view to pass it on to his children. The judgment was confirmed in S. A. No. 373 of 1860. In another case [3], he said: "I allow that it should never be done

1. *Moore's Malabar Law* p. 137.

2. A. S. 28 of 1814 : 1 *Sudder Decisions* 118. 3. A. S. No. 61 of 1860.

without clear proof, that the conduct of the head is calculated to beggar the family." The learned Judge found that this had been made out in that particular case. He could hardly have intended that it was necessary to show that the family was actually beggared by the conduct of the karnavan. In the case of *Valia Thamburatti of the Pudia Kovilagom* [1], the same learned Judge said " I do not agree with the Subordinate Judge that one act of misfeasance on the part of the karnavan is enough for the court to take action in the matter. To warrant such a proceeding, there must be evidence of a course of a conduct on the part of a karnavan of a kind tending to defeat the very purpose for which the tarwad is in existence." What is this purpose ? The learned Judge's statement is of very little use as a general proposition. Perhaps the leading case on the subject is *Eravanni Revi Varman* v. *Ittapu Revi Varman* [2]. In that case there were only two male members in the tarwad. The Subordinate Court found that the defendant was guilty of serious misconduct, but that the plaintiff was quite as bad, if not worse, and it therefore dismissed the suit. The District Court on appeal appointed a receiver to manage the estate. The High Court considered this course unjustifiable and reversed the District Court's decision. They characterised the litigation as of a kind which was of recent growth and fostered by the sympathies of judges who were themselves anandravans. They proceeded : " as in a case which recently came before us it has been exercised on a mistaken principle that a man can properly be removed whenever a single departure from his duty to act equally for the benefit of all can be proved against the karnavan. In such a state of property and family relations as that of Malabar, there must be constant conflict of interest with duty. This, however throws upon the court in case of such conflict the duty of checking acts referable to interest of that character, but it by no means justifies the treatment of the karnavan as

1. Mad. Law Reporter 130 (R. A. 24 of 1876). 2. (1876) I. L. R. 1 Mad. 153.

a mere trustee, officer of corporation, or other person to whom he has been likened. The law in this case as in so many others, has suffered from the pressing of false analogy. The person to whom the karnavan bears the closest resemblance is the father of the Hindu family. Like him his situation as the head of the family comes to him by birth. He should certainly not be removed from his situation except on the most cogent grounds. The office is not one conferred by trust or contract, but is the offspring of his natural condition. Expediency speaks the same language as the law. Benefit seldom accrues to a family or an institution from removing one man and putting in another. It is generally the substitution of the empty leech for the full one. The belief that this removal will take place on the slightest grounds has led in this very family to a long course of litigation which must have caused much of the expenditure complained of. It is stirring up family quarrels throughout the district, and no more striking instance than the present of the inexpediency of such a course could be given." They observe later on: "Compelled to choose between introducing a stranger and leaving the management in the hands of him to whom law and custom assign it, there can be no doubt on the facts of this case that we ought to choose the latter course. The state of families and properties in Malabar will always create difficulties. Their solution will not be assisted by bringing in the anarchy and insecurity which will follow upon any attempt to weaken the natural authority of the karnavan." This case is looked upon as a sort of charter of liberties to erring karnavans which it certainly is not. It only points to the necessity for caution, and rightly confines court's interference to gross cases. In *Thimmakke Akkie* [1], the learned Chief Justice Sir Arnold White says the one of the tests employed in the case namely whether having regard to the competency and character of the other members the tarwad will gain by the removal has not been accepted

1. (1910) I. L. R. 34 Mad. 481.

in later cases but it cannot altogether be ignored [1]. In judging of the necessity of the removal the learned Judges say that the karnavan is not a mere trustee or officer of a corporation, and that his position bears close resemblance to that of the father of a Hindu family but as they themselves point out "There is constant conflict of interest with duty in the Marumakkathayam system of society." A large number of persons of very different degrees of relationship to each other are often huddled together into a family; and yet the children of the male members do not belong to it. The temptation to sacrifice the interests of this artificial family to those of one's own children who have no legal position in it, is extremely strong and generally prevails over the sense of legal duty. The junior members not being entitled to partition or generally even to separate allowance for maintenance are absolutely at the mercy of the karnavan. In former times before the organisation of the British Courts, the members of the family were able to bring an erring karnavan to reason or to oust him from his position by their own force and by the moral force of their neighbours. But that is no longer possible under the British Law. The courts while protecting the karnavan in the discharge of his duties, must compel him to discharge them strictly. The only reasonable test in such cases is whether the affairs of the tarwad are safe in the hands of the karnavan. It is quite possible that a single transaction *may* show that he is unfit for his office. It is not necessary that breach of trust or misappropriation should be brought home to him. If he is guilty of gross negligence in the discharge of his duties, whether in preserving the family property, or in duly maintaining the junior members, there is no reason why he should not be removed. If an act of fraud is established, that coupled with a long course of unbusinesslike or improvident conduct constitutes a ground for his removal [2]. As rightly said

1. A. S. 289 of 1916.

2. *Thimmakke* v. *Akku* (1910) I. L. R. 34 Mad. 481 at 485.

in *Varanakol* v. *Varanakol* [1] the management of the karnavan " may not be as prudent or beneficial as that of another manager but unless he acts *mala fide* or with recklessness or utter incompetency he cannot be removed from management", [2] In the case of a trustee who owes his position to an instrument of trust or to court, so much might not be necessary. In the case of a karnavan the question is not merely whether the act with which he is charged is wrong or not, but whether it is of such a character as to show that he cannot be trusted to behave properly in the future. It is not a necessary inference from this proposition that a course of conduct showing persistency in misbehaviour is necessary to justify removal. Each case must depend on its own circumstances, and it is wrong to lay down a hard and fast rule that continuous misconduct is necessary to entail removal. In *P. P. Kunhamod Hajee* v. *P. P. Kuttiath Hajee* [3] the Hig Court removed a karnavan for granting a very improvident lease of tarwad property on the ground that it was not an isolated act but the culmination of a course of misconduct in which the karnavan displayed utter disregard for the interests of the tarwad. But suppose there was no previous misconduct, but he made a gift of the whole tarwad property to his children. It can hardly be contended that the Karnavan would be entitled to be retained in his position after such an act. Unnecessary or fraudulent alienation of family property, fraudulent setting up of his own title to family property and helping others to set up title thereto are regarded as bad breaches of trust justifying removal. [4] In S. A. Nos. 44 and 60 of 1891 it was argued that the properties found to have been improperly alienated bore so small a proportion to the family properties that the alienation was not a sufficient

1. (1880) I. L R. 2 Mad. 328.
2. *See* A. S. 289 of 1916.
3. (1881) I. L. R. 3 Mad. 169.
4. *Vasudevan Nambudri* v. *Sankaran Nambudri* (1897) 7 M. L. J. 103 *Kunhanna Shetty* v. *Timmaju* (1914) 27 M. L. J. 60 ; *Thimmakke* v. *Akku* (1910) I. L. R. 34 Mad. 481.

ground for removing the karnavan. Their Lordships say in answer "We cannot accept the numercial estimate. The effect of the decisions is that no general rule can be laid down as to what acts or omissions on the part of the karnavan will justify the court in deposing him. The question is whether the continuance of the karnavan will be injurious to the property of the tarwad and to the interests of the other members." A substantial breach of trust or disregard of tarwad interests after condonation by the family of past breaches is a more serious affair than a misbehaviour standing by itself. [1] Violation of the terms of a family karar is also considered a ground for dismissal but to have this consequence the breach must be a serious and not merely a technical one. [2] Failure to discharge a family debt, when the karnavan had family funds in hand coupled with an attempt to set up title in himself has been considered sufficient to justify the karnavan's removal. [3] In *Chami Mannadiar* v. *Thengu Mannadiar* [4] a karnavan had broken his agreement not to hypothecate family property without the consent of the anandravan, had allowed the family lands to be sold for arrears of revenue, had failed to provide maintenance to junior members and had also failed to defend a suit against the family where a good defence was open. These were held to be sufficient grounds for removing him. In S. A. No. 712 of 1877, the District Judge removed a karnavan on the ground of intemperate habits, frequent absence from tarwad, contracting debts after a *locus penitentiae* had been granted and putting the collection of rents into the hands of Embrandiris and the decree was affiirmed on appeal. In *Nemanna Kudre* v. *Achmu Hengsu* [5], the Karnavan partitioned the property as between

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1. S. A. 712 of 1877 .

2. *P. P. Kunhammad Hajee* v. *Kuttiath Hajee* (1881) I. L. R.3 Mad. 169 ; *Cheri Pangi Achan* v. *Unnalachan* (1916) 32 M. L. J. 323.

3. *Kunhanna Shetty* v. *Timmaju* (1914) 27 M. L. J. 60.

4. A. S. 753 of 1881. 5. (1919) I. L. R. 43 M. 319 : 37 M. L. J. 539

himself and his brother ignoring the other members of the family and each was dealing with the property as his own. This was held to be ground for removing both of them. In *Kunhan* v. *Sankaran* [1] it was argued that as the misconduct imputed to the karnavan was committed by him whilst he was only a *de facto* karnavan it should not count against him so as to disentitle him from holding the present position as *de jure* karnavan. In answer to this argument their Lordships say : " the question to be kept in view is, whether by reason of misconduct the appellant had rendered himself unfit for the office of karnavan and on this point it can make no difference to the tarwad whether the misfeasances were committed by him solely or in conjunction with another ; in either case, the interest of the tarwad required that the management should not be entrusted to him." Referring to *Nambiatan Nambudiri* v. *Nambiatan* [2], they say that " the authority of the *de jure* karnavan is absolute and that he may at his pleasure put an end to the management of tarwad affairs (by a junior member.) It is certainly no authority for exonerating the *de facto* manager from responsibility or blame for the maladministration of tarwad property." Their Lordships were not also prepared to attach weight to the appellant's contention that some of the lands unnecessarily encumbered belonged to the branch tarwad and that his acts of mismanagement so far as they relate to those lands should be excluded from consideration. The effect of the decision may be taken to be that misconduct of the junior member in relation to the family property in whatever capacity may be taken into account in a suit for removal when he becomes a karnavan 3. In this case he had usurped the office during the life-time of the previous karnavan and the misfeasance imputed to him was committed by him during that period.

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1. (1890) I. L. R. 14 Mad. 78. 2. (1864) 2 M. H. C. R. 110.

3. *See* also *Nemanna Kudre* v. *Achuta Hengsu* (1919) I. L. R. 43 M. 319 : 37 M. L. J. 539 and S. A. 1842 of 19.

57. Their Lordships do not make any difference between the case where he acts as a mere delegate or agent. This is going too far. The office comes to him by nature. He cannot be prevented from succeeding to it on the ground that he is unfit for it [1]. Suppose he never had anything to do with tarwad affairs, but the junior members are able to show that he is a fool and would be quite unfit to manage. It would be impossible for the court to hold that he should not on that ground succeed to the office. The court has no jurisdiction to decide which member is most fit for the office, or whether any member is sufficiently fit for it. Its jurisdiction is punitive in character. It can only remove a person on the ground that he is guilty of mismanagement. That being so, misconduct with respect to the tarwad or its property before a person becomes Karnavan cannot prevent the office from vesting in him. Suppose he mismanages his own affairs or was guilty of breach of trust with regard to the property of a third person. It cannot afford a ground for removing him from the karnavanship as soon as the office vests in him and before he is guilty of any misconduct as Karnavan. The position is exactly the same even if the misconduct before the vesting of the karnavanship in him had relation to the tarwad property. The misconduct was not as karnavan, and he can be removed from that office only for misconduct while holding the office. His delinquencies in respect of other properties or in other capacities can justify his removal only if they show that he is incapable of improving. It must be such as may be put on a level with a conviction for a serious offence.

58. In some cases the court while making a decree removing the karnavan, has appointed another karnavan, generally the next senior member, but sometimes it has passed over him as unfit for the office and appointed some other member. In one case, while removing the Karnavan the court appointed two persons instead. This seems to be illegal. The court

1. 1 *Sudder Decisions* 118.

has no power to do any such thing. When the court removes the Karnavan, the next eldest member of the tarwad is by right entitled to succeed. He requires no appointment from the court and the court has no power to appoint him either. The right to the karnavanship goes by nature to each member in succession and the court has no power to change the order. As already pointed out it has no power to pronounce a person unfit unless he is an idiot or a lunatic. The appointment of two persons as karnavan is equally unjustifiable. These remarks were cited with approval in *Cheria Pangi Achan* v. *Unnalachan* [1]. In *Nemanna kudre* v. *Achmu Hengsu* [2] a different view is taken and it is held that in a suit for removing a karnavan the court may not only remove him but also declare the next senior anandravan or anandravans to be unfit to act as karnavans. [3]

59. Another question of importance is whether, when the court does not consider that a sufficient case has been made out to remove a karnavan, it can curtail his power or give him any directions with regard to matters that have come before it in the inquiry into his conduct. In S. A. No. 766 of 1880, Turner, C. J. and Muthuswami Aiyar, J. held that the Court could not do so. In that case the lower court directed that the power of the karnavan should in future be restricted by joining his senior anandravan in all acts of management, a direction similar to that which was given by the Provincial court of the Western Division in a case in 1813 which was confirmed by the Sudder Court in 1 Sudder Decisions, 18. The High Court set aside the order and observed as follows :—"The court must either pronounce a karnavan unfit for his office and dismiss him from it, or if it retain him, it must allow him to exercise the ordinary functions of a karnavan, unless he consents to surrender them." The same opinion has been expressed in *Cheria*

1. (1916) 32 M. L. J. 323.
2. (1919) I. L. R. 43 M. 319 : 37 M. L. J. 539.
3. Also S. A. 1895/19 and 1/1920

Pangi Achan v. *Unnalachan* [1] Dr. Ormsby in his outlines of Marumakkathayam Law also holds the same view [2]. In *Karumpan* v. *Kunjen* [3] the Travancore High Court (Kunhi Raman Nair and Sitarama Iyer, JJ.) held that the Court could not, while dismissing a suit for the removal of the karnavan on account of the creation of an improper mortgage on tarwad property, direct the karnavan to redeem the mortgage which was held to be improper within a certain time. They observe "so long as the first defendant is retained in the karnavanship he is entitled to use his own discretion as to when and how to recover property belonging to the tarwad in the hands of third parties and he cannot be compelled to redeem mortgages, except perhaps in extreme cases when there are valid grounds for apprehension that the property would be wholly lost to the tarwad by lapse of time. If the 1st defendant neglects his duties as karnavan or acts fraudulently, the fact may give the plaintiffs a fresh cause of action for seeking his removal, but his power as karnavan cannot be curtailed by the courts, if his conduct has not been such as to render his dismissal from karnavanship expedient." On the other hand, the power to impose restriction has been affirmed in *Krishnan Kesavan* v. *Krishnan* [4]. The court of Equity in England even without express statutes, exercises the jurisdiction to give direction to trustees with respect to the administration of trusts. In India the Trusts Act expressly gives similar jurisdiction to the court and the courts possess the power at any rate in the Presidency Towns as Courts of Equity without any legislation. There certainly would be many cases where such a power would be most useful and salutary, and where perhaps there would be no oth means of protecting the interests of the tarwad. As the law ands at present, the matter seems to

1. (1916) 32 M, L. J. 323.

2. p, 5.

3. (1891) 8 Tr. L. R. 120.

4. (1898) 15 Tr. L. R, 21 ; *also Ayyappan* v. *Bhagavathy* (1908) 2 Tr. L. R. 1.

be one for the legislature. There is nothing however, against the court passing a conditional decree that if the karnavan sets right the mischief committed by him by following certain directions, the suit for his removal should stand dismissed but that otherwise he should be removed, if it really thinks that the karnavan's misconduct is not sufficiently grave to require an unconditional removal of him from the office. Such decrees are often passed in suits brought for the removal of trustees. In *Cheria Pangi Achan* v. *Unnalachan* [1] Mr. Justice Sadasiva Iyer thinks that even this is not justified. But a different view has since been taken. In Appeal 289 of 1916 the court directed the karnavan to furnish security for the due performance of his duties as a condition of his continuance in the office [2]. A serious practical difficulty has sometimes been felt in cases where the court refuses to remove a misbehaving karnavan on the ground that his conduct has not been shown to be irretrievably bad. Suppose the court finds that the karnavan has made an improper alienation and declares it invalid, but refuses to remove him; who is to hold possession of the property improperly alienated? The Madras High Court has held that a junior member may, on behalf of the tarwad, recover possession of the property. [3] But would not the karnavan be entitled to call upon him to deliver possession of the property to himself as the only person entitled to be in possession of the property on behalf of the tarwad? A Full Bench of the Travancore High Court in *Mannu* v. *Neelakand* [4] over-ruling previous decisions to the contrary, has held, in accordance

1. (1916) 32 M. L. J. 323,

2. *See also* C. M. A. 380 of 1917.

3. *Anantan* v. *Sankaran* (1890) I. L. R. 14 Mad. 101; *Sankaran* v. *Kesavan* (1891) I L. R 15 Mad. 6.

4. (1896) 12 Tr. L. R. 211.

with the Madras view, that a junior member may recover possession of the property wrongfully alienated by the karnavan but that when he has done so, it must pass to the general control and management of the karnavan. A similar view has been taken also in Madras, [1] somewhat anomalous state of things surely but there is no getting out of it on principle. For otherwise, it would lead to various members of the family holding possession of different portions of the tarwad property,—that is cutting up the management of the family estate and vesting it in a number of persons. When removing the karnavan the court may apparently award maintenance to the karnavan. [2]

60. There was considerable trouble for a long time over the satisfactory valuation of suits for the removal of karnavans. For the purpose of court fees it was held that the suit was incapable of valuation as it was not strictly a suit for possession, the possession of the property being in the Tarwad whoever fills the office of karnavan. [3] For the same reasons it was also ruled that for purposes of jurisdiction, the parties might put their own valuation though it was said that the valuation must be *bona fide* and must rise in proportion to the value of the property. [4] These difficulties have been solved by a rule framed by the Government which prescribes that both for court fee and jurisdiction purposes, suits for the removal of the karnavan and ejaman as well as those for the enforcement of a person's right as karnavan or ejaman shall be valued at one third the amount at which the suits should have been valued if it was for the recovery of the entire

1. *Chelakote Rama Kurup* v. *Shekara Kurup* (1910) 21 M. L. J 87.

2. A. S. 162 and 319 of 1877.

3. *Govindan Nambiar* v. *Krishnan Nambiar* (1881) I. L. R. 4 Mad. 146; *Narangoli Kunhi Raman* v. *Kunhunni Nambiar* (1881) I. L. R. 4 Mad, 314.

4. *Krishna* v. *Raman* (1887) I. L. R. 11 Mad. 266; *Ganapati* v. *Chathu* (1889) I. L. R. 12 Mad. 223,

movable and immovable properties of the tarwad as against a stranger. [1] The rule may not apply where the property is in possession of a member adversely to the tarwad.

61. It was ruled in a number of Travancore cases that all the adult members of the tarwad are necessary parties to such a suit [2] but it has since been held that though " it is in the highest degree advantageous both to the karnavan and the tarwad that all the members should be present before the court in order to assist it to come to a proper conclusion as to the desirability of confirming, removing or otherwise dealing with the karnavan, on principle there is no distinction between such a suit and a suit for the cancellation of alienations by the Karnavan in which the conduct of the karnavan is called in question In both classes of cases the remedy which the plaintiffs seek is sought on behalf of the tarwad and not on behalf of the plaintiffs individually. It is well settled that in suits for cancellation of alienations some of the junior members may sue on behalf of the entire tarwad and that decree made in such cases will bind all the members whether actually impleaded or not. We are unable to see that the principle of representation of a tarwad in a suit for removal of the karnavan is different." [3] So far as the British courts are concerned, in *Kunhan* v. *Sankara* [4] it was held that the non-joinder of minor parties is immaterial. This very fact would show that the joinder of other parties is not essential. As observed by Mr. Justice Muthuswami Aiyar in *Moidin Kutti* v. *Krishnan* [5] it is more to avoid multiplicity of suits than on any ground of defective representation that the joinder of the other members of the family is insisted upon.

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1. *Notification of the 26th Febuary* 1903, *Fort St. George Gazettee*, 3rd *March* 1903 *Part II*, p. 368 (See *Appendix*).

2. *Aiyappan* v. *Parameswaran* (1903) 18 Tr. L. R. 252 ; *Aiyappan Kanly* v. *Bhagavathi Neelamma* (1908) 24 Tr. L. R, 1.

3. *Raman Govinden* v. *Raman Neelakantan* 30 Tr. L. R. 257.

4. (1890) I. L. R. 14 Mad. 78. 5. (1887) I. L. R. 10 Mad. 322.

CHAPTER VIII.

KARNAVAN : RENUNCIATION AND DELEGATION.

62. Renunciation—Partial and absolute—Effect of. 63. Delegation—Difference between renunciation and delegation 64. Delegation to stranger and to family member—Difference between—Karnavan's powers how far unaffected.

62. In *Cherukoman* v. *Ismala* [1] and *Velia Kaimal* v. *Velluthadatha Shamu* [2], Mr. Justice Holloway expressed the opinion that karnavanship could not be renounced, but since then a Full Bench *in Kenath Puthen Vittil Tavazhi* v. *Narayan* [3], has decided to the contrary. There, a junior member agreed, as the result of a compromise, not to claim the right of management when it accrued to him unless the majority of the family members agreed thereto and such an agreement was held binding. In the opinion of the Full Bench, it made no difference whether the renunciation was the result of a compromise or was only a unilateral act and whether the renunciation was of the present right or only of the prospective right of management. The Full Bench decision seems also to recognise (though its opinion on the point is obiter) a partial renunciation. It speaks of "renunciation of the right of exclusive management by agreeing to the association of another member of the family" and "of the absolute renunciation of the right to manage a substantial portion of the properties of the tarwad." Allotments of properties to Tavazhies and junior members for maintenance are also referred to as instances of renuciation when such allotments are not mere temporary arrangements revocable at the will of the karnavan but are made as a part of a family arrangement. In one of the cases relied upon, judging from the statement of facts

1. (1871) 6 M. H. C. R. 145. 2. (1871) 6 M. H. C. R. 401.
3. (1904) I. L. R. 28 Mad. 182.

the junior member was not the next anandravan. The use of the word *Renunciation* in these connections is misleading. The word ought appropriately to be limited to cases where there is a complete abandonment of his rights by the karnavan so as to let in the next in succession. It is certain, at any rate, that the substitute will acquire all the rights of a *de jure* karnavan only under such a renunciation. As a part of a family karar, karnavanship may perhaps be validly put in commission with all the incidents of a karnavanship *de jure*. But it cannot be done by agreement with certain individual members of the family ; at any rate the Full Bench does not cover such cases. Where the karnavan *de jure* is in management though shorn of certain of his poweres it is better to regard him still the karnavan *de jure*. The renunciation need not be with respect to all the properties but as far as it goes, it must be complete. In cases where there is no such complete abandonment, the karnavan will still retain his position as such and all such powers as are not expressly or impliedly conferred on the substitute will remain in him [1] and his acts even in respect of the prohibited transactions may bind the tarwad as in the case of ordinary restrictions on his powers of disposition or management, when the other side has no notice of the prohibition [2]. On this point a distinction is made between a karar manager and manager *de jure* in several cases in Travancore and the distinction seems to be justified when there has not been a renunciation of the complete kind [3]. But when there has been such a renunciation, the karnavan ceases to be such, though in the matter of ceremonial precedence etc., he might still retain his position. In the only sense with which lawyers are concerned the next in succession takes his place. And a suit will lie to remove

1. *Karunakara Menon* v. *Kutti Krishna Menon* (1916) 5 L. W. 511. See also *Krishna Menon* v *Krishna Nair* (1920) 40 M. L. J. 338.

2. *Kanna Pisharodi* v, *Kombi Achan* (1835) I L R. 8 Mad. 381.

3. C. R. P. 847 of 1919.

such manager if he is guilty of misconduct [1]. In *Cheria Pangi Achan* v. *Kunalachan* [2], the view is taken that it is not open for the junior members of the family to sue for the removal of a manager appointed under a family karar when the karnavan has not been deposed. The authority to remove the manager so appointed vests according to their Lordships in the family council and if any obligations are imposed upon the manager the person to enforce them is the karnavan. One point which seems to be overlooked in the case is why the mere fact that the karar is styled a family karar, should disentitle the other members who are parties to the contract to enforce its performance. Another point is, though the suit may not be technically a suit to remove a karnavan, if the karnavan acquiesces in the conduct of the manager there is nothing to prevent its being treated as a suit to correct the abuse of the power by the karnavan, involving as one of the consequential reliefs the prohibition of further interference by the manager. Of this, more when considering family karars.

63. Renunciation must be distinguished from delegation or transfer of the office of karnavan. This is beyond the power of the karnavan. He may no doubt appoint an agent who will be responsible to him, but he cannot make an out-and out transfer of his duties as manager. His rights and powers are *personal* to himself and if he does not care to exercise them, the next anandravan is entitled to succeed to his place. By their very nature his rights and duties are incapable of transfer. Though the position of a karnavan is similar to that of a trustee and like a trustee he cannot delegate any of his functions which involve the exercise of discretion he may delegate functions of a ministerial nature. He may like a trustee also appoint an agent to work under him and subject to his control. But if he purports to make a complete

1. *Chindan Nambiar* v. *Kunhi Raman Nambiar* (1917) I. L. R. 41 Mad. 577.
2. (1916) 32 M. L. J. 323.

delegation of his rights and duties, it would be void. If therefore, a karnavan delegates all his rights and obligations either to another member of the tarwad or to a stranger without any power of revocation, the Court will not give effect to such an instrument, but treat it merely as a power of attorney and hold the karnavan entitled to revoke it.

64. In *Cherukomen* v. *Ismala* [1], a karar executed by a karnavan in favour of an anandravan provided as follows :— "As I have handed over my anandravan Achutan the lands before allotted to my maintenance, not only there is no tarwad property in my possession or under my control ; but I will not interfere with any property or with the affairs of the tarwad; and if I interfere it shall not be valid". Holloway, A. C. J. and Innes J construed the instrument as a power of attorney and held that the clause against revocation could not be given effect to. There can be no doubt of the soundness of their Lordships' view. Such a clause would be invalid in the case of any power of attorney. If the instrument is treated as a transfer of the right of management, such right being inalienable the transfer was wholly bad, Holloway, J considered it unnecessary to consider whether by a contract, a karnavan could part with his privileges so as to be unable to resume them but stated certain considerations which in his opinion made renunciation impossible in law. On this point the view of Holloway, J. has been over ruled by the Full Bench in the case above referred to and it is unnecessary to refer to it in detail. The remarks of Innes, J. in that connection are pertinent on the other question as to whether there can be a transfer or delegation of the powers of the karnavan. Said his Lordship:—"If, on the other hand, the intention of the karnavan as expressed by the document were to transfer his rights absolutely, it would be, I apprehend, an invalid instrument. A man cannot assign obligations without the consent or authority of those to whom the

1. (1871) 6 M. H. C. R. 145.

duties are owing. And whereas in the present case rights are co-existent with and inseparable from obligations, so that the assignment of the one cannot be effected without the assignment of the other, there can be no valid transfer of rights without the consent and authority of those interested in the performance of the obligation." The learned Judge is right in saying that an assignment or transfer of the karnavan's rights would be invalid. He has no power to put any other particular person in his place. Renunciation stands on quite a different footing. The karnavan does not by renouncing purport to put any particular person in his place ; he merely withdraws himself, and the next anandravan steps in by operation of law to the vacant office. In *Appuni* v. *Shangunni* [1], the question was similar to that in the previous case. In *Govindan* v. *Kannaran* [2] Innes and Kindersley, JJ merely re-affirmed the proposition that a karnavan may revoke an arrangement by which a junior member was appointed to manage a portion of the family property. In *Chappan Nayak* v. *Assen Kutti* [3], a karnavan who was sentenced to a period of imprisonment for a criminal offence delegated his functions to his son who was of course not a member of the tarwad. Collins, C. J. and Muthuswami Iyer, J. held that it was void. Their Lordships said : "There can be no doubt and it is not denied for the respondent that karnavanship, as recognised in Malabar, is a birth-right inherent in one's status as the senior male member of the family. It is therefore a personal right, and as such it cannot be assigned to a stranger, either permanently or for a time. If it can be delegated at all, it is capable of delegation only to a member of the tarwad, the principle being that the *de facto* manager assists the karnavan during his pleasure and he is entitled to do so by reason of his connection with the tarwad and his interest in its property. We

1. (1871) 6 M. H. C. R. 401. 2. (1878) I. L. R. 1 Mad. 351.

3. (1889) I. L. R. 12 Mad. 219.

are referred to no decided cases in support of the proposition that karnavanship is an alienable interest or is capable of being delegated to a stranger to the tarwad. If such were the case, a Moplah may become a karnavan of a Nair tarwad, and the anomaly would be apparent, when it be remembered that the karnavan has to preside at the tarwad ceremonies as its representative in addition to managing the tarwad property. The decision in this case must in our judgment depend on the construction of Ex. B. If it is an assignment of the right of karnavanship, it is void, though for a term only, on the ground that the delegate is not a member of the tarwad. If, on the other hand, it is a power of attorney limited to management of specific property as an agent subject to the general control of the karnavan, it may be valid on the ground that the karnavanship is not the interest assigned or delegated." The law as to delegation is clearly expounded by the learned judges though it is not easy to agree that the delegation would be valid if it was to a member of the tarwad. Their Lordships themselves seem in one part of their judgment to say that such delegation can be upheld only by treating the delegation as tantamount to the appointment of the junior member as an attorney of the karnavan. What might look like a recognition of wider power of delegation is to be found in *Krishnan Kidavu* v. *Raman* [1] but it is used there only in the sense of appointment of an attorney. It may well be that where there has been appointment of an attorney by the family as part of a family karar, the karnavan cannot revoke the agency without the concurrence of the family. This does not contravene the elementary proposition of law referred to in *Cherukomen* v. *Ismala* [2] by Holloway, J. that an agency is revocable at will. By reason of the restriction on the karnavan's power involved in such joint appointment the

1. (1915) I. L R. 39 Mad. 918.

2. (1871) 6. M. H. C. R. 145.

will of the tarwad which normally is identified with the will of the karnavan could in this instance, be only that of the family members assembled in family conclave. It may well be even in such cases that if no express restriction is placed on the action of the karnavan, in the event of the delegate misbehaving it is open to the karnavan to terminate his authority. The appointment of a junior member as a mukt-yar or agent cannot in the above view preclude the karnavan from actiug himself. It has been accordingly held in *Krishna Menon* v. *Krishna Nair* [1] that melcharth granted by the karnavan in those circumstances was perfectly valid. In *Krishna Kidavu* v. *Raman* [2] where some specific powers had been conferred on a previous karnavan who had ceased to be such by his having become a stani such as granting renewals and demising lands under a family karar, it was held that the karnavan was not prevented from taking renewals from the jenmis of the kanoms owned by the family.

1. (1920) 40 M. L. J. 338.

2. (1915) I. L. R. 39 M. 918.

CHAPTER IX.

FAMILY KARAR.

65. Family karar—always upheld 66 Bending effect—Persons not parties, how far bound—67. Effect on strangers—Notice—Supersession of karnavan by—difference if any 68. Conclusions summerises.

65. Though since the decision of Holloway J in *Cherukomen* v. *Ismala* [1] for a long time it was a matter of doubt whether the karnavan could absolutely renounce his rights so as to be unable to resume them there was no doubt entertained at any time that his powers may not be narrowed and curtailed or checked by means of what is known as a Family Karar. In A. S. No. 336 of 1854, Mr. Holloway, then Sub-Judge observed with reference to a claim to set aside a mortgage which would have been otherwise valid on the ground that the karnavan had no right to grant it according to an agreement to which the members of the tarwad were parties : " I am clearly of opinion that the whole members of a family have the right, by common consent, to regulate the karnavan's agency and that with the consent of all the members it was possible for the tarwad to narrow his authority " [2]. In S. A.Nos. 87 and 88 of 1857 [3] the Sudder court upheld an agreement under which the karnavan had renounced his right of exclusive management and had agreed to manage the tarwad properties jointly with another. In *Allala Tharagan* v. *Govinda Tharagan* [4] upholding a karar against the karnavan the Court said : " The contention of the appellant is that the karar (agreement) of 1868 was illegal. It is not necessary for us to consider whether the karar, if objected to by the family, is one which would be allowed to stand

1. (1871) 6 M. H. C. R. 145.
2. *Zillah Decisions Sep.* 1855, P. 18.
3. *Sudder Decisions*, 1857, p 158.
4. S. A. 8 of 1880.

against them. There is no such objection by any of the family, though it was executed in 1868 and has been acted upon with full consent of the family down to the present time. There is ample reason to suppose that the karar was executed for the benefit of the family. It is the outcome of disputes and litigation in the family and by it those disputes and litigations were happily ended. There is apparently no reason for setting aside the karar and certainly at the instance of the karnavan."

66. Again in *Gopala Menon* v. *Kesava Menon* [1] the High Court held "the right of the karnavan to recover possession applies to cases in which he has voluntarily conceded a temporary possession to an anandravan for management. Here he has no greater right to put an end to the contract than any other member of the family." In *Kanna Pisharodi* v. *Kombi Achan* [2] it was held "ordinarily, it is of course true that the karnavan of a Malabar Tarwad is entitled to grant renewal of a kanom but it is in the power of the family with the assent of the karnavan to place a restriction on his ordinary powers." It was also held that such restrictions are not binding against a person dealing in good faith without notice with the karnavan. Again in *Komu* v. *Krishna* [3] the High Court said "the karnavan is not entitled of his own authority to set aside a family arrangement made on behalf of all the family members of the tarwad." This case is meagrely reported and it does not appear whether the karnavan who wished to repudiate the karar was himself party to the karar. Apparently he was not karnavan at the time the karar was entered into. All these cases were considered in *Kenath Puthen Vittil Tavazhi* v. *Narayanan* [4] and the Full Bench upheld an agreement by the karnavan renouncing management. In spite of these cases the question still remains what a family karar is, under what circumstances it is

1. S. A. 357 of 1881
2. (1885) I. L. R, 8 Mad. 381.
3. (1887) I. L. R. 11 Mad. 134.
4. (1904) I. L. R. 28 Mad. 182.

binding on the tarwad and in what circumstances persons who are not assenting parties to it are bound by it. It cannot be said that these questions have been finally settled. It is not necessary that all the members of the family should be parties *eo nomine* to the karar [1]. Though purporting to be only between some of the members it might in fact be one between all the members of the family or subsequent conduct might show that the family has adopted it thereby giving it the character of a family karar [1]. A karar between the manager and some of the members though relating to the family management should be distinguished from a family karar strictly so called, for the former though it may be binding on the immediate parties to it will not have any operation beyond the life-time of the karnavan who is party thereto, while a family karar though ordinarily may have no higher operation [2] if it expressly purports to have a higher operation it will have such operation. Concessions made by the karnavan can of course be witheld by him at any time but with karars it would be otherwise [3]. He cannot of his own authority put an end to the karar unless a substantial alteration has taken place in the condition of affairs [4]. Even then it is doubtful if he could do so without reference to court or at least without a consultation with the family and the concurrence of the majority [5]. In *Govindan* v. *Kannan* [6] it is assumed that such arrangement may be terminated by the karnavan and the senior anandravans. No karar can permanently alter the law with reference to the family but the karar might start a practice which might justify the

1. *Pangi Achan* v. *Bheeman Achan* (1915) 32 I. C. 501.

2. *Cheria Pangi Achan* v. *Unnalachan* (1916) 32 M. L. J. 323 : (1917) M. W. N. 185; and per *Sadasiva Iyer J.* in *Chindan Nambiar* v. *Kunhi Raman Nambiar* (1918) I. L. R. 41. Mad. 577 : 34 M. L. J. 400 (F. B.)

3. *Gopala Menon* v. *Keshava Manon* S. A. No. 357 of 1881. ; *Pangi Achan* v. *Bheeman Achan supra*. *Govindan* v. *Kannaran* (1878) I. L. R, 1 M. 351.

4. *Kelu Achan* v. *Lakshmi Nethiar Ammal* (1913) 18 I. C. 234.

5. *Komu* v. *Krishna* (1887) I. L. R. 11 Mad 134 ; *Cheria Pangi Achan* v. *Unnalachan* (1916) 32 M. L. J 323 : (1917) M. W. N. 185.

6. (1878) I. L. R. 1 Mad. 351

acts of the karnavan on that basis till that practice is formally put an end to by the parties bound thereby. Family karars may create subordinate interests in property in favour of individuals or branches whether by way of maintenance or for management. They may appoint joint-managers to act with the karnavan or the management may be virtually transferred to one or more of the junior members. A karnavan cannot be removed from management by the other members except by a decree of Court. His power is not derived from his anandravans. He is not their agent, and they cannot sit in judgment over him to pronounce him unfit for the position of management and depose him from it. If they wish to get rid of his authority, they must resort to a Court of Justice for the purpose. The right to manage is a natural right that each member has when he becomes the seniormost male in the tarwad, and it cannot be taken away from him except by renunciation on his own part or by a decree of Court removing him from office. For the same reason the members of a tarwad cannot, by anticipation, pronounce any person unfit for the office of karnavan when he becomes entitled to it. It seems to be equally clear that they cannot curtail the rights either of the karnavan for the time being or of anybody else who succeeds to the place of manager without his consent [1]. It is reasonable to hold that where any particular member whether karnavan or not agrees to certain regulations for the well-being of the tarwad, he is bound by them. Where all the adult members of a tarwad agree to any regulation acting *bona fide* in the interests of the tarwad the minor members are bound by them and cannot question them unless they show fraud on the part of those that framed the regulations or show that they are so obviously mischievous or subversive of the interests of the tarwad that they should not be upheld [2]. Again since it is open to

1. *Cheria Pangi Achan* v. *Unnalachan* (1916) 32 M. L. J. 323.

2. *Veluthakkal Chirudevi's daughter Parukutty* v. *Veluthakkal Tarwad Karnavan Kelappan Nair* (1916) 31 M. L. J. 879.

the karnavan himself to some extent to frame rules for the conduct of the business of the family, it may be held that except in so far as the individual interests of any member who dissents from the provisions of the family karar are affected, he cannot question them. If his right of maintenance is not affected and if the karar does not contain any provisions which are calculated to destroy the family property, a junior member would hardly find it possible to question the karar. Abstention for personal reasons of one member cannot affect the binding nature of the karar on those who are parties to it [1]. Even with regard to his right of maintenance, if a large body of the members of the family agree that a particular rate of maintenance is reasonable he would find it practically impossible to get the Court to take a different view. But it is doubtful whether a karar entered into by a number of members fixing a certain rate of maintenance for each anandravan is as such binding on any member dissenting from it or not assenting to it either expressly or by acquiescence. It is difficult to see on what principle it can be held to be binding on him. The members of a family whether it be a Marumakkathayam Tarwad or a family governed by the ordinary Hindu Law are not members of a corporation with a vote for each of the members. The votes of the majority cannot be held to be binding on the minority irrespective of the decision they arrive at. The rights and the duties of the karnavan as manager and of other individuals as members of the tarwad are the creature of the Common Law and of usage. They may be affected so far as any individual is concerned by a contract to which he is a party, or by any usage of the family. But short of that no one can be bound by a contract to which he is not an assenting party. A person who is not party to a Karar is not bound to set it aside. He may simply ignore it if it is in excess of the powers of the parties to it. [2]

1. *Pangi Achan* v. *Bheeman Achan* (1915) 32 I. C. 501
2. *Sankaran Nair* v. *Gopala Menon* (1906) I. L. R. 30 Mad. 6.

67. As to the effect of the karars on strangers, the earliest case that notices the point is one decided by Holloway, J. as Sub-Judge in 1855. Thus argued the learned Judge: "If they allowed their karnavan to deal with the property, it would be concluded that he had full authority to do all things usually done by men in his position and it would not be open to them afterwards to come in and say that they had enacted private rules limiting his authority as the rules in this case do. Here however, there is something more in the case ; the defendant makes an important admission that he knew of the existence of certain rules but he merely disputes the accuracy of their representation by the plaintiffs. . . . . We have here then the case of a man who having notice of the existence of the rules, chooses to act in defiance of them." The effect of the judgment is that a stranger without notice of the restriction is not bound by it but if he has notice that some rules exist, he acts at his peril if he enters into the contract without taking care to ascertain what they are. The next case in which the point is dealt with is *Kombi Achan* v. *Lakshmi* [1], and the opinion of their Lordships is indicated in the 3rd issue that was framed. "If the authority of the karnavan was limited, had the lender (2nd defendant) notice of limitation of authority ?" The point again came for consideration in *Kanna Pishoradi* v. *Kombi Achan* [2], and the same view was taken. If the reasoning of Holloway, J. is accepted, where there is a total prohibition against the Karnavan dealing with the property his disposition will not be binding on the family, whether the lender had notice or not. Apparently that is not the meaning of the learned Judge. If the Karnavan still retains his karnavanship, however limited that authority, a person acting with him *bona fide* will be protected. If you employ a general agent like a factor, you are bound by all the customary incidents of such agency and any secret instructions to

1. (1881) I. L. R. 5 Mad. 201. 2. (1885) I. L. R. 8 Mad. 381.

the contrary given to the factor will not bind a third party acting without notice of such restriction. The decisions above noted proceed upon the analogy of this rule. But suppose the effect of the karar is to terminate the karnavan's authority altogether. How would it than stand? Would the analogy of S. 208, Indian Contract Act apply and would third parties not be affected till they have notice of such termination? This would be pushing too far the analogy of agency. The karnavan is not an agent. He has authority to act by reason of his status. If he ceases to have the status, he has no longer authority to act on behalf of the family. If the analogy is pressed too far, even a decree in a suit deposing the karnavan might not be efficacious enough to terminate the agency so far as ignorant strangers are concerned. Whatever the effect of these restrictions on the powers of the karnavan *dejure*, so far as a manager *de facto* whose authority is traceable entirely to the karar, is concerned a person dealing with him cannot plead ignorance of the restrictions [1].

The result of the above discussion may be summarised as follows .—

(1) A karar agreed to by all the members for the time being and intended to provide for the future management of the tarwad would probably be binding upon it including the members who are born in it after the karar.

(2) A karar assented to by all the adult members for the time being is *prima facie* a binding agreement. But it is open to those who were minors at the time to challenge it by showing that it is the result of fraud on the part of those that entered into it or that it is so detrimental to the interests of the tarwad that it should not be upheld [2].

(3) A karar cannot without the consent of any member curtail his rights as karnavan either at the time of the karar

1. C. R. P, 847 of 1919.

2. *Veluthakkal Chirudevi's daughter Parukutty* v. *Kelappan Nair* (1916 31 M. L. J. 879 : (1917) M. W. N. 106.

or in future, whether he is the karnavan at the time of the karar or becomes karnavan after the karar [1].

(4) A party to the karar cannot ordinarily dispute its binding effect on him.

(5) Where a karar is assented to by the majority of the members of a tarwad, a junior member who does not assent to it will probably not be allowed to question it, unless his right to maintenance is affected thereby or unless the rules enacted by the karar are very injurious and in order to protect the tarwad it should be set aside [2].

(6) Restrictions or limitations placed upon the authority of the karnavan short of entire deprivation of authority will not be binding against strangers who had no notice of such limitation or restriction.

1. *Pangi Achan* v. *Bheeman Achan* (1915) 32 I. C. 501 ; *Cheria Pangi Achan* v. *Unnalachan* (1916) 32 M. L. J. 323.

2. *Pangi Achan* v. *Bheeman Achan*(1915) 32 I. C. 501.

CHAPTER X.

RIGHTS AND REMEDIES OF JUNIOR MEMBERS :— MAINTENANCE OF JUNIOR MEMBERS.

69. **Rights of junior members** 70. Right of maintenance—Scope of and limitations—Hindu Law-difference between 71. Maintenance—Individual right—Rights when living in family house 72. **Melchilavu, Right to** 73. **Right to maintenance when not residing in the family house** 74. **Proper reasons for staying away** 75. Outcaste—Rights of 76, Rate of maintenance—Principles of assessment 77. Costs of funerals 78. Costs of litigation 79. Items to be allowed, discussed 80. Existence of separate property or rights against others 81. Maintenance—primarily payable only out of income 82. Charge, if proper.

69. The cardinal distinction, next to the rule of succession, between the ordinary Hindu Law of Mitakshara and the Marumakkathayom system is the absence of a right to compulsory partition on the part of the members of the famliy. The members are no doubt joint owners but the law does not recognise any right in them to convert their joint ownership in the whole into several or separate ownership in parts of it. Hence the importance of a clear definition of the rights of the karnavan and also the necessity to control him in the management of the tarwad affairs. Hence also the great importance attached to the right of the junior members to succeed to the karnavanship. The rights of the junior members are : (1) the right to succeed to the management, (2) the right to be maintained by the karnavan, (3) the right to object to any improper administration of the property of the tarwad and to see that the property is duly conserved for the use of the tarwad, (4) the right to bar an adoption and (5) the right to get a share at any partition that may take place. [1]

1. *Kunigaratu* v. *Arrangaden* (1864) 2 M. H. C. R. 12 ; ***Moidin Kutti*** v. *Krishnan* (1887) I. L. R. 10 Mad. 322 ; *Ibrayan Kunhi* v. *Komamutli Koya* (1892) I. L. R. 15 Mad. 501 ; *Chandu* v. *Subba* (1889) I. L. R. 13 Mad. 209.

70. Of these the second and the last alone are substantive or effective rights, the rest being only subsidiary ones. The word "maintenance" is loosely applied to designate the right of the junior members to participate in the enjoyment of the family property. It is not a *jus in re aliena* like that of a widow. It is an incident to and a mode in which the proprietary right of each individual member of the Malabar Tarwad is enjoyed [1]. To such a claim, Art. 127 and not Art. 128 of the Limitation Act applies [2]. Unlike mere claims for maintenance, the right when defined may be assignable [3]. A suit for maintenance of this sort does not fall within the clause relating to maintenance in the Schedule to the Small Cause Courts Act [4]. The right of the junior member is ordinarily restricted to his being maintained in the family house [5]. In other words, no junior is ordinarily entitled to claim separate maintenance, if the karnavan does not choose to allow it. There is nothing to prevent the karnavan from allotting a separate maintenance to one member and refuse to do so to another. It is not open to an anandravan to claim separate maintenance for himself merely on the ground that it is allowed to another. In consequence of the absence of the right to partition, the question as to the circumstances under which a junior member is entitled to claim separate maintenance is of great importance in the Marumakkathayom Law. The point is of very little importance in the Mitakshara Law, for a junior member who is dissatisfied with the conduct of the manager can and will enforce his right to a partition. It has even been doubted whether according to the ordinary Hindu Law a junior member is entitled to claim

1. *Ammani Amma* v. *Padmanabha Menon*, (1918) I. L. R. 41 Mad. 1075 ; 35 M. L. J. 509.
2. *Multakke* v. *Thimmappa* (1891) I. L. R. 15 Mad. 186.
3. *Seshappa Heggade* v. *Chandayya Heggade* (1919) 37 M. L. J. 402.
4. *Achutan Nair* v *Kunjunni Nair* (1903) 13 M. L. J. 499.
5. *Kunchi Amma* v. *Ammu Amma* (1912) I. L. R. 36 Mad. 591 ; 24 M. L. J. 559 : *Kunigaralu* v. *Arrangaden* (1864) 2 M. H. C. R. 12 *Subbu Hegadi* v. *Tongu* (1869) 4 M. H. C. R. 106.

maintenance at all. In *Ayyavu Moopanar* v. *Niladalchi Ammal* [1], it was assumed that such a suit would lie. On the other hand, the Bombay High Court in *Himmat Singh Becharsingh* v. *Ganpat Singh* [2], held that a junior member having right to partition must enforce that right and cannot sue for maintenance only. There is no reason for denying to a person who has two distinct rights the choice of determining which of them he will enforce. It is not easy to see on what principle the Court is to say to a junior member that he must exercise his right to division and forego the advantages, it may be, of remaining undivided with his coparceners, or that otherwise he must give up the right which he has, while the family is undivided, to be maintained out of its income. Whatever the correct view on this question may be, no suggestion has been made that even if a junior member is entitled to maintenance, he can only claim to be maintained in the family house. The rule that separate maintenance should not ordinarily be awarded is probably due to two different rights being confounded with each other. The karnavan, as the head of the family, has a certain disciplinary jurisdiction over the junior members. It may be that as part of this jurisdiction he would have the right to decide where the members of the tarwad shall live. The junior members have another, and altogether distinct right to be maintained out of the income of the tarward property. Supposing they disobey the karnavan's desire as to where they should live, can the karnavan withhold their rights to maintenance? Can he make their right conditional on their obeying his direction to live in a particular place? The High Court has held in *Teyan Nair* v. *Raghavan Nair* [3], that the karnavan cannot refuse to maintain a junior member on the ground of his misbehaviour. There can be no doubt of the soundness of this

1. (1862) 1 M. H. C. R. 45.
2. (1875) 12 Bom. H. C. R. 94.
3. (1881) I. L. R. 4 Mad. 171.

rule as otherwise it would be open to a karnavan to starve an anandravan to death on the ground of misconduct. If that be so, there is no reason for holding that one particular kind of misconduct, viz., refusing to live in the family house, should be sufficient ground for withholding maintenance. Apart from the discipilinary power of the karnavan, is there any reason for holding that a junior member not living in the tarward house should not be entitled to maintenance ? It may be conceded that it would be comparatively easier for the family to maintain all the members in one house than to allow them each a separate maintenance. But if a person chooses to live separately, either because he has occupation elsewhere or for any other purpose which is not improper, is it not an economical and moral blunder to refuse to allow him separate maintenance. ? The enforcement of the rule would result in a person sticking to the family house if he is not able to earn quite enough for himself elsewhere. Would it not be better both in the interests of the junior member and of the tarwad to allow him to live apart without withholding from him reasonable allowance from the family funds according to its means ? There is nothing in the genius of the Marumakkathayom law to prevent this being done. No doubt when respect for the karnavan was supreme and his authority was regarded as almost absolute, he often carried his powers of discipline to the point of refusing to maintain any junior member that crossed his slightest wish. But it is doubtful whether it could be said that he possessed any legal right to do so.

71. The right to maintenance is an individual right. Every member of the tarwad possesses it himself or herself and not merely as a joint right in combination with other members. In one case it was even contended that a joint suit by a number of members was bad for misjoinder. The court disallowed the contention though the individual nature of the

right was held to be beyond question [1]. In *Kunhammatha* v. *Kunhikutti* [2], Turner, C. J. said : Each member of a tarwad has a right to be maintained and suffers a personal wrong if that right is not accorded to him." But the learned Judge held that if the karnavan does not maintain the anandravans, an anandravan cannot sue for a money allotment. He says : " It appears to me that the only remedies open to the members of a tarwad, if the karnavan neglects his duty to provide for the resident members, are to procure supplies or to sue for the removal of the karnavan on the ground of his neglect of a primary duty [3]." With all respect for the learned Judge it is difficult to appreciate this view. If the right to maintenance is an individual one, why is not each member entitled to sue for maintenance if it is infringed by the karnavan ? If the tarwad properties be liable for the discharge of loans contracted by each anandravan for his maintenance in consequence of the karnavan failing to maintain him, why should he not be entitled to sue the karnavan directly instead of through a creditor ? It will certainly not be easy for an anandravan to obtain loans from strangers for his maintenance, and the remedy of getting the karnavan removed is neither appropriate nor adequate. Supposing the new karanavan also fails to maintain him, what good would it be to him merely to get each successive karnavan removed ? Muthuswami Iyer, J. agreed with Turner C. J. but held that possibly all the anandravans together might be entitled to compel their karnavan to make an adequate provision for their support in the tarwad house. He said " the karnavan is legally bound to provide a suitable maintenance for his anandravans in the tarwad house, and it may be a question whether a joint suit by the anandravans is not the remedy. Each anandravan has a right to be maintained, but it is a right to be maintained jointly with others

1. *Raman Menon* v. *Ittimayamma* (1899) 9 M. L. J. 153.
2. (1883) I. L. R. 7 Mad. 233.
3. See also *Makki Keyi* v. *Keloth Mammad* (1905) 16 M. L. J. 275.

in the tarwad house, and his remedy is that of one who has a joint and individual right to enforce." It is impossible to defend this view. It is inconsistent with the Chief Justice's opinion and Muthuswami Iyer's own opinion in *Moidin Kutti* v. *Krishna* [1]. In a later case [2] where the karnavan had left the tarwad house Brandt and Parker, JJ. held that the junior members could bring a suit for separate maintenance. They distinguished *Kunhammad's case* [3] as one in which the parties were being maintained in the tarwad house, and the objection was to the scale on which they were being maintained. It does not appear from the report of the case whether this statement is correct, but it seems to us that it makes no difference whether the suit is in consequence of the karnavan not maintaining the junior members at all or in consequence of his not maintaining them properly. The decision in *Kesava* v. *Unnikanda* [2], is really inconsistent with the earlier case, but there is no doubt that it is correct. In a more recent case [4], Sundara Aiyar and Sadasiva Iyer, JJ. held that a suit is maintainable by a junior member for reasonable medical charges incurred by him.

72. Some recent cases have gone further and decreed suits for *melchilavu* and pocket allowances customarily paid to junior members of Kovilagoms, etc. in addition to the feeding charges borne by the family [5]. They are placed by these decisions on the same footing as maintenance. The exact legal basis of the claim has not been stated in any of those cases. The distinction sought to be made in *Ravunni Achan* v. *Thaukunni* [6] from *Kunhammatha* v. *Kunhikutti* [3] that in the last case, it was a money allowance that was sought to be

1. (1887) I. L. R. 10 Mad. 223.
2. *Kesava* v. *Unnikanda* (1887) I. L. R. 11 Mad. 307.
3. (1888) I. L. R. 7 M. 233.
4. *Kelu Achan* v. *Unnala Achan* (1912) 17 I. C. 704.
5. *Valia Konikkal Edom Kelu Achen* v. *Lakshmi Ammal* (1913) M. W. N. 379; *Govindan Nayar* v. *Kunju Nayar* (1919) I. L. R. 42 Mad. 686 : 36 M. L. J. 565; *Ravanni Achan* v. *Thaukunni* (1919) I. L. R. 42 Mad. 789.
6. (1919) I. L. R. 42 M. 789.

claimed whereas in this case it was compensation for non-payment of melchilavu is unconvincing. The straight way of meeting the difficulty is to recognise that the decision in *Kunhammatha* v. *Kunhikutti* [1] is wrong. The real justification for the claim is that that is the customary mode of looking after the maintenance of the individual members of the family and unless the Karnavan has adopted some other, the Court should decree melchilavu.

73. The next question is in what cases a junior member is entitled to separate maintenance, even though he does not reside in the tarwad house. If the karnavan does not allow him to live there, or in consequence of ill-treatment makes it impossible for him to live there, there can be no doubt that separate maintenance will be awarded to him [2]. It has also been held that where there is no room in the tarward house, separate maintenance may be awarded [3]. Again, if there are several houses belonging to the tarwad used as dwelling houses by the members, a junior member may be entitled to be maintained in any one of those houses. The learned Judges say in *Parvadi* v. *C. K. Chathu Nambiar* [4], "The rule is not contravened by the recognition of a right to maintenance in a member residing in one of several houses which convenience or necessity has, as it were affiliated to the original tarwad home." But if the karnavan has a right to require the members to live in the tarwad house, it is difficult to see why he should not have the right to require any particular member to live in the house which he decides should be his residence. *Prima facie* it should be left to the karnavan to decide where the various members are to reside, for if each member were entitled to choose his own residence, disorder and confusion would eventually arise. Accordingly the Travancore High Court in *Krishna* v. *Chakki* [5], has laid down that even where

1. (1883) I. L. R. 7 M. 233.
2. *Pern Nair* v. *Ayyappan Nair* (1880) I. L. R. 2 Mad. 282.
3. *Kunhambu Nambiar* v *Patdal* S. A. 23 of 1882.
4. (1881) I. L. R. 4 Mad. 169. 5. (1894) 12 Tr. L. R. 61.

there are several tarwad houses, the consent of the karnavan is required for a person choosing any one of those houses as his residence before he can claim to be maintained there. Krishnaswami Rao and Sitarama Iyer, JJ. say : " It is contended, and the contention is allowed to be founded on fact, that the plaintiffs live at present in a house belonging to the tarwad built by the karnavan upon the site of the original tarwad seat. This circumstance does not entitle the plaintiffs to separate maintenance as the karnavan is opposed to their separating themselves from the rest of the family. It is doubtless the interest of the karnavan in the well-being of the family to maintain the compactness of the family circle and to make the several members thereof live in harmony with one another." And the rule they lay down is that even when there is inconvenience in all the members living together the consent of the karnavan must be obtained by each member for choosing his residence. In *Chekkutti* v. *Pakki* [1] separate maintenance was allowed to a junior member not living in the family house, but living in another house belonging to the tarwad. But the court observed in that case that the karnavan did not contend that the plaintiff lived apart from him without his permission and contrary to his wish. Where an anandravan lives in a house belonging to the tarwad, it may perhaps be ordinarily presumed that he does so with the consent of the Karnavan ; but it would be difficult to maintain that the Karnavan has not the right to distribute the members amongst the different housse as he thinks fit. In a recent case [2] Sadasiva Iyer and Phillips, JJ. have held that a lady living in a separate room in the family house owing to her scruples as to cooking of fish was entitled to separate maintenance. When a state of things has gone on for a number of years without objection it may be unreasonable on the part of the karnavan to terminate it arbitrarily without reason.

1. (1888) I. L. R, 12 Mad. 305. 2. (1917) M. W. N. CXCVII.

To give an extreme instance it may be unreasonable and therefore beyond the power of the karnavan to separate arbitrarily a child from its mother. It should be within the power of the Court to see if the exercise of the discretion of the karnavan is *bona fide* and exercised in the interest of the family or an arbitrary or fraudulent exercise of his discretion. If it is the latter the court may well disregard his decision.

74. It was held in an early case from South Canara [1] that a female member living apart from her family with her husband was not entitled to separate maintenance. If the suit was for arrears, there might have been some justification for the decision. It may be presumed that a woman leaving her family house for her husband's looks to him for support and does not intend to claim maintenance from her own karnavan. But suppose her husband is too poor to support her and she gives distinct notice of it to her karnavan, should her claim to maintenance be disallowed even in such a case? Can it be held that a woman is not leaving her family house for a justifiable reason when she does so to live with her husband? Can it be held to be right that the karnavan should be entitled to confine the women to the family house and to compel their husbands to visit them there? If the husband is willing to bear a portion of the expense of the maintenance of his wife and children, is it either in their interests or in the interests of the tarwad that his request should be disallowed unless he is able to bear the whole burden himself? Surely there is nothing in the Marumakkathayom system requiring the courts to hold that this is not a case in which the woman would be entitled to separate maintenance. The feeling of the community is certainly in favour of allowing her claim. In *Kandi Pillai* v. *Velayudhen* [2] the Full Bench of the Travancore High Court after reviewing all the authorities on the subject held that a woman residing with her

1 *Subba Hegadi* v. *Tongu* (1869) 4 M. H. C. R. 196.

2. (1908) 24 Tr. L. R. 24.

husband is entitled to maintenance if she lives with him with the consent of the karnavan. The contrary view taken in *Kandankumaren* v. *Lakshmi* [1] was not followed on the ground that the social practices have changed since that decision which justified a re-consideration of the view taken in that case. They doubt if the consent once given can subsequently be withdrawn. In *Raman Menon* v. *Ittimayamma*[2] Subramania Iyer and Moore, JJ. held that where a woman is ordinarily living in one of the tarwad houses she is not disentitled to maintenance on the ground that she goes occasionally to her husband's house and spends some time there. In *Krishnan* v. *Govindan* [3] the same Judges held that a junior member was not entitled to be paid by the karnavan the expenses incurred by him for being educated in an English School in a place distant from the tarwad house. The karnavan contended that he was not bound to defray the expenses of plaintiff's education in the English language, and that he was willing to give the plaintiff such education in his own place as was practicable there. The suit was not framed as one for maintenance generally, and the question was not, therefore, considered whether a person leaving the family house for the purpose of attending a school, even though it is not agreed to by the karnavan, is not entitled to separate maintenance. He may not be entitled to a larger maintenance than he would otherwise be entitled merely on the ground that he goes away for education. There is no reason why he should not be allowed the same maintenance as might have been allowed if he had left for any other proper reason such as the misconduct or cruelty of the karnavan. It is absolutely necessary in the interests of progress and it would not be contrary to the principles of Marumakkathayom system that the courts should act in a

1. (1880) 1 Tr. L. R. 55.
2. (1899) 9 M. L. J. 153.
3. (1898) 8 M L. J. 294.

liberal spirit in determining what are justifiable grounds for leaving the tarwad house so as to entitle a junior member to maintenance. Applying these principles it was held in *Maradevi* v. *Pammakka* [1] (a case under the Aliyasanthana Law) that a woman living with her husband was entitled to separate maintenance unless there was reason to infer waiver and that case was followed in *Muthu Amma* v. *Gopalan* [2] and *Kunhi Krishna Menon* v. *Kunhi Kavamma* [3] more recently in ordinary Marumakkathayom cases. The principle as stated in these cases is that maintenance is only loosely so called; it is really the mode in which each co-owner enjoys his or her right in the family property and the right to maintenance is not forfeited unless the member in question leaves the family house for an improper purpose. It has been accordingly held that a male living away from the family house in order to live with his wife and manage her affairs was entitled to maintenance [4]. If this is right then there is no reason why a person living away from the family house for his education or an employment should not get his maintenance from the family property. In the case of Tavazhi property, there is not this restriction as to residence and the junior members would be entitled to maintenance whether they live with the manager or not. In the case of Kovilagoms and other aristocratic families of Malabar, it is the practice to allow separate maintenance to junior members without any special reason.

25. The question has often arisen whether a member of a tarwad who has become an outcast not by a conscientious change of religion, in which case he will be protected by Act XXI of 1850, but owing to immoral conduct or any other caste offence, is entitled to maintenance. And it has always been held that he is not, though there is no decided

1. (1911) I. L. R. 36 Mad. 203.
2. (1912) I. L. R. 36 Mad. 595.
3. (1918) 35 M. L. J. 565.
4. *Govindan Nair* v *Kunju Nair* (1919) I. L. R. 42 Mad. 686.

case of the Madras High Court on the point. In the present altered view as to the circumstances in which maintenance is claimed, the decision should now be the other way.

76. The rate of maintenance that a junior member is entitled to has to be determined with due reference to his needs and the means of the tarwad. No member is entitled to an aliquot share of the income of the tarwad [1]. The karnavan is bound to treat all equally, but this does not mean that he must give an equal amount to all, but only that he should not make an arbitrary distinction between them [2]. Where the income is not sufficient to provide a suitable maintenance for all, the circumstances of each member with respect to his private acquisitions may be taken into consideration. [3] Mr. Wigram once laid down that the karnavan should be allowed half of the whole income of the tarwad for the maintenance of his own position and for meeting the common expenses of the tarwad, [4] but the High Court over-ruled him and said that no such general rule could be laid down. The karnavan is no doubt, bound to meet the general expenses and is for that purpose entitled to an appropriate portion of the income; but it is impossible to lay down any general rule as to the proportion of the income that he may use for that purpose. Nor is the karnavan in reality entitled to allot to himself a larger portion of the income than he gives to others. He possesses no larger rights in the property of the tarwad than the other members of the tarwad. If his needs be greater, he may appropriate to himself a proportionate share of the income, but his position as karnavan gives him no right to a larger share than others. But in effect the requirements of the position of the karnavan

1. *Kunigaratu* v. *Arrangaden* (1864) 2 M. H. C. R. 12; *Kunji Amma* v. *Valia Kaimal* (1882) I. L. R. 5 Mad. 71.
2. *Kunji Amma* v. *Valia Kaimal* (1882) I. L. R, 5 Mad. 71.
3. *Teyan Nair* v. *Ragavan Nair* (1881) I. L. R, 4 Mad. 171.
4. *Narayani* v. *Govinda* (1884) I. L. R. 7 Mad. 352.

and the duties attaching thereto are such as that an equal allotment to the karnavan and the anandravans can hardly ever be justified [1]. A practice seems to have grown up of treating a minor as equal to half an adult in calculating the rate of maintenance. There is no justification for such an artificial rule. The test in each case is the need of the individual having due regard to the income of the family. [2] In an early case, the award of a low rate of maintenance is suggested as a means of discouraging actions for maintenance. The present spirit is against all such artificial discouragement. Such a course is also unjust for save in exceptional circumstances mostly traceable to the default of the karnavans separate maintenance is not awarded. It should include reasonable payments which, in the case of a male, he is bound to make according to custom to his wife and children, and the expenses of his education suitable to the position of the tarwad. In the case of female anandravans, the *kalyanam* or marriage expenses should also be included. The right to maintenance must be construed liberally so as to include all such expenses as a junior having regard to his status and position in life may reasonably incur in the same manner as the word "necessaries" has been construed in English Law with reference to infants. They have been held to include necessaries for an infant's wife and children, the costs of preparing a marriage settlement, the expenses of the burial of his wife and children, or in the case of an infant widow, of the burial of her husband, expenses of an infant's teaching and instruction, and the costs of successfully defending a suit brought against the infant. The question really is what expenses of an anandravan are a proper charge on the tarwad property. It is immaterial whether they can be brought strictly within the

1. *Sankunni Menon* v. *Ammu Ammal* (1910) M. W. N. 676 : 8 M. L. T. 443.

2. S. A. 1177 of 1916.

scope of the term "maintenance". Whether the costs of English education should be considered a necessity should depend upon the status of the family and possibly also upon the previous history of the family. It would be outrageous that in a family in which all the members have been highly educated at the family expense a karnavan should have the power to refuse the benefits of such education to a junior member, when the state of the family finances could afford it. In these matters the courts should not feel themselves bound by precedents. The state of the country is changing. New needs arise. What was considered a luxury at one time has become a necessity now. Why should the courts feel themselves bound by decisions which were passed at a time when they were right enough having regard to the conditions, but are an anachronism now? The decisions do not lay down a principle of law but are only an application of the well known rule. The rule of law is that the anandravan should be allowed for his maintenance what is reasonable and proper having regard to his needs and having regard to the position, affluence and status of the family. What is reasonable and proper will depend upon the circumstances and the times and would be a pure question of fact. In a case from North Malabar, *Parvati* v. *Kunaran Nair* [1] where a question was raised as to whether a junior member was entitled to be paid the reasonable expenses of maintaining his wife and children the court remitted for trial an issue on the question. The District Court of North Malabar found that custom sanctioned such a charge and the court accordingly awarded the plaintiff, a junior male member, the expenses of maintaining his wife and children. As observed in *Muthu Amma* v. *Gopalan* [2] the practice has arisen in South Malabar also for ladies to reside with their husbands and there is no reason why in awarding maintenance the expense of maintaining them should not be taken

1. (1882) I. L. R. 6 Mad. 341. 2. (1912) I. L. R. 36 Mad. 593; 23 M. L. J. 496.

into consideration. Among the people governed by the Aliyasanthana Law, the practice was all along as in North Malabar and there is no reason to make any distinction between their case and that of the North Malabar Marumakkathayis. This does not mean that the court is thereby recognising any right in the wife and children to claim maintenance from the family of the husband. The right is the right of the husband to recover from the family the expenses of maintaining his wife and children as a recognised necessity just as much as the right to recover as a part of his maintenance reasonable medical charges or clothing charges. Somewhat of a set back is to be found in *Ravanni Achan* v. *Thankunni* [1]. In that case their Lordships declined to allow a a junior member *mechelavu* for his wife. Their Lordships in so doing even doubt the decision in *Parvati* v. *Kumaran Nair* [2]. Their argument is that to allow maintenance on account of the wife is to recognise the claim of the wife. It has been already shown how this is not a correct statement of the position. Another ground stated is that the claim is in respect of *melchelavu*. Nor does that seem to be a valid ground of distinction. If *melchelavu* can be recovered at all, there is no reason why *mulchelavu* should not be recovered for the wife and children as well.

77. The Travancore High Court held in *Ayyappan Thanuvan* v. *Raman*[3] that a junior member who performed the funerals of a deceased female member of the family was entitled to recover the costs from the karnavan who had neglected to perform them. The Judges say : "Under the general principles of Hindu Law, it is the duty of every head of a family to provide for the suitable funerals of deceased members. The failure of this duty, coupled with the fact that the funeral was duly performed by some other member of the tarwad entitled the person who performed the funeral and incurred

1. (1919) I. L. R. 42 Mad. 789: 37 M. L. J. 157.
2. (1883) I. L. R. 6 Mad. 341.
3. (1891) 9 Tr. L. R. 126.

the necessary expenses to demand from the head of the family the payment of such expenses." It may perhaps be doubted whether the rule is not stated in too wide terms. The karnavan is, no doubt, bound to have the funerals of deceased members of the tarwad duly performed and to incur the expenses necessary therefor, and it may be that any particular anandravan whose duty it is directly to perform the ceremonies would be entitled to recover the costs from the karnavan if he fails to disburse them. But it is doubtful whether an anandravan who is not under any such special obligation and who is only under the same obligation as the karnavan himself can claim to recover the expenses of the funerals if he undertakes to perform them in consequence of the karnavan's neglect.

78. In *Gopalayyan* v. *Coonju*[1] the Travancore High Court held that the expenses incurred by an anandravan in defending a false criminal charge against him could be recovered out of the tarwad funds. The reasonable expenses of maintaining the reputation of its members against unjust attacks on it are a proper charge on the estate of the tarwad. The amount which could be so recovered must necessarily depend upon the circumstances of each case and the means of the family. And it may be that the costs of every criminal prosecution though false, may not be recoverable. The question would be whether the defence is reasonably necessary to maintain the reputation of any individual member and indirectly of the tarwad. A member would probably find it difficult to recover the expenses of any litigation, civil or criminal, against him before the litigation itself is at an end for he would have to establish that his case is a true one and that it is necessary in the interests of the tarwad that the truth should be established. He would ordinarily have to incur the expenses himself in the first instance and afterwads

1. (1888) 5 Tr. L. R. 128.

recover the amount from the tarwad after the event has justified the expenditure. It would seldom be possible for him to recover the expenses from the tarwad where he has failed in the litigation. In *Subbu* v. *Krishnacharya* [1] a mortgage by the karnavan for the defence in a rioting case in which a number of members of the family were involved and who were acquitted though on appeal was upheld.

79. It is not possible to state exhaustively the expenses which may in particular cases be recoverable by a member out of the tarwad funds. But they should certainly not be confined merely to the costs of maintenance, in the narrow sense of the term. The karnavan has no larger rights in this respect than any other member, though as one having the command of the funds, he is generally able to treat himself very generously.

80. Ordinarily the existence of separate property [2] is not a ground for disallowing maintenance nor is the fact that other persons also are bound to maintain the junior member in question. [3]

81. Maintenance is primarily a charge on the family income and the karnavan would not in the abence of special circumstances be entitled to encumber or alienate family property for the purpose of paying the maintenance [4]. The onus must lie heavily on the alienee to prove that he satisfied himself by proper enquiries that the karnavan could not meet the charge out of the current income. A junior member that has a decree has the power to proceed against the family property at least in the last resort [5] or otherwise it would be in the power of the karnavan to render the decree wholly nugatory. [6] The court

1. (1910) 21 M. L. J. 150.
2. *Teyan Nair* v. *Raghavan Nair* (1881) I.L.R. 4 Mad. 171 *Kunji Amma* v. *Vadia Kaimal* (1882) I. L. R. 5 Mad. 71
3. *Ammani Amma* v. *Padmanabha Menon* (1918) I. L. R. 41 Mad. 1075.
4. *Bhuvaragha Iyengar* v, *Natesa Iyer* (1917) M. W. N. 40 at p. 43 also 10 Cal 985.
5. S. A. 340 of 1885 ; *Koran Nayar* v. *Chanda Nayar* (1867) 3 M. H. C. R. 295.
6. *Chandu* v. *Raman* (1888) I. L. R. 11 Mad. 378.

should however in fairness to the family proceed against the family property only in the last resort after exhausting all the remedies against the person of the karnavan or the income of the family. As already stated it is quite usual for the karnavans to make allotments of property for maintenance. [1] There is no reason why the court should not resort to it as well, if the junior members are constantly driven to suit for their maintenance or there is reason to apprehend from the conduct of the karnavan that such will be the case.[2] Other members cannot object to arrangements for maintenance made by the karnavan when their individual rights of maintenance or the rights of the family are not seriously prejudiced thereby. The numerical increase of the family must from time to time necessitate a new distribution and the karnavan may call in property so allotted and redistribute it or make other arrangements for maintenance at his discretion. [3] It is not however open to the karnavan to supersede the arrangements made without substituting some other arrangement even if that arrangement consists in nothing more than asking them to come over to the family and partake of the joint mess.[4] Where the arrangement is the result of an agreement which is proper at the time it is not open to the karnavan of his own authority to cancel it.[5] Nor would a slight alteration justify even the court to cancel the arrangement so made but on a substantial change in circumstances the Court might cancel it. The family

1. *Vira Rayen* v. *Valia Rani* (1881) I. L. R. 3 Mad 141 ; *Kunigaralu* v *Arrangaden* (1864) 2 M. H. C. R. 12 ; *Chirudevi's daughter Parukutti* v. *Kelappan Nair* (1915) 34 I. C. 818 : 31 M. L J. 479.

2 *Sankaran Unni* v. *Appavu Pillai* (1912) 16 I. C. 571.

3. S. A. 450 of 1881 ; *Vira Rayen* v *Valia Rani* (1881) I. L. R. 3. Mad. 141 ; *Kannan Nayar* v. *Tenju Nayar* (1882) I. L. R. 5. Mad 1; *Valia Konekkal Edom Kelu Achen* v. *Lakshmi Ammal* (1913) 18 I. C. 234 : (1913) M. W. N. 379.

4. S. A. 563 of 1905 *Ramaswami Patlar* v. *Gopalan Nayar* (1916) 32 M. L. J. 97.

5. *Yakkanath Eacharanunni Valia Kaimal* v. *Vasunni* (1909) I. L R. 33 Mad. 436.

council with a majority might also do it. An allotment to a branch made on the basis of the then existing number of members will not prevent subsequently born members from requiring an addition to the amount.[1] Arrangements for maintenance will not ordinarily be viewed as permanent arrangements though it is not impossible that there should be such arrangements. Divisions for enjoyment short of partition that are sometimes entered into are of this character. The right of junior members to maintenance from branch property is, in effect, though not in theory, somewhat higher. We shall deal with it when dealing with that topic.

82. Is a member of a Marumakkathayom family entitled to have his maintenance made a charge upon the family property or any portion of it? As already stated the right of the junior member is a mode of proprietary enjoyment and is not strictly a right to maintenance. It is not as in the case of widows and disqualified heirs under the ordinary Hindu Law a right which exists where there is no proprietary right. The right to maintenance cannot be defeated by an alienation by the karnavan except when it is for a proper purpose. If the alienation is proper, it stands on the footing of an alienation by the whole family including the person entitled to the charge. If the alienation is improper, he can set it aside and protect his right. It has been held that even property allotted for maintenance can be sold in execution for common family debts incurred subsequently to the allotment.[2] The case of those entitled to maintenance under ordinary Hindu Law is entirely different. There the proprietor is at liberty to dispose of the property as he pleases, and it is in consequence necessary to protect those entitled to maintenance from the improper alienation that may be made by the family. It may be urged on the other side that, even supposing that the

1. *Pattu Nethiar Amma* v. *Dharmam Achan* (1913) 21 I. C. 755.
2. *Kondi Menon* v. *Kunni Ponnu* (1864) 2 M. H. C. R. 41.

family cannot be viewed as a corporation, there is nothing in law to prevent a transfer to one of the co-owners by all the co-owners including himself. (See S. 8 of Transfer of Property Act.) A charge may prevent a private alienation by the other members without the charge-holder's consent. But even so, such a charge would be of a peculiar kind. Though converted into a charge it is only a mode of enjoyment of the property by the individual member and cannot stand against common family claims which an outsider has against the family. *Chandu* v. *Ramaji*[1] seems to approve of a charge being given.

1. (1888) I. L. R. 11 Mad. 378.

CHAPTER XI.

RIGHTS AND REMEDIES OF JUNIOR MEMBERS : RIGHT TO CONSERVE PROPERTY.

83. Right to conserve the property—Suit for declaration that alienation bad—Individual right 84. Right to sue for possession—Discussion on principle 85. Case Law, discussion of 86. Travancore, case law in 87. Injunction, right to 88. Mandatory injunction not admissible—Other remedies Costs of interference—Right to recover.

83. The remedy which the anandravans possess of removing the karnavan has already been dealt with. Here the other additional remedies that are given to them in order to conserve the family property will be considered. It may be stated once for all that no junior member can claim as a right to have the tarwad property improved or increased. The karnavan alone has got power to do acts reasonably necessary or proper for the benefit of the tarwad, and the anandravans have no power to require him to do such acts. In order to conserve the tarwad property it has been established by judicial decisions that an anandravan is entitled to institute a suit to obtain a declaration that any alienation made or any charge created by the karnavan is not binding on the tarwad. To hold otherwise, would indeed be practically to nullify his right in the tarwad property as he is not entitled to sue for partition. The question is fully discussed in *Moidin Kutty* v. *Krishnan* [1]. In such a suit although it may be instituted only by a single anandravan, it is advisable that all the members of the tarwad should be made parties, as otherwise the judgment will not be binding on those who are not parties, and it would be open to them, in case the alienation is held to be binding on the tarwad, to institute fresh suits to establish that the alienation

1. (1887) I. L. R, 10 Mad. 322.

was improper [1]. The same rule is applied in the case of beneficiaries where a trustee is guilty of a breach of trust. Any beneficiary, however small his interest in the property may be, is entitled to ask the court to preserve the trust property, but all the beneficiaries should be parties to the action. Though the right of each anandravan is an individual right, as it is a similar right to that of the other members, in suing for the same relief any number of members may sue together. They may also combine reliefs in respect of any number of alienations [2]. If any portion of the consideration is found binding, the Court will declare a charge to that extent in favour of the alienee [3]. If the major portion of the consideration is found binding, the Court may uphold the entire disposition as in the case of widow's or co-parcener's alienation under the Hindu Law [4]. The junior members are not bound to set aside the alienation by the karnavan. If the alienation is not justified by necessity, it is void against them, and they may sue for possession ignoring the alienation [5]. If the possession remains within the family, they may simply sue for a bare declaration [6]. Possession of the junior members is *prima facie* that of the tarwad and as such where the land is in their possession suit for bare declaration will suffice [6] but if their possession is adverse to the family, the suit must be for possession [7]. Limitation for a suit for declaration will be six years from the date of the alienation [8].

1. *Per Muthuswamy Aiyar, J.* in *Moidin Kutti* v *Krishnan* (1887) 10 Mad. 322.

2. *Abdul* v. *Ayaga* (1889) I. L. R. 12 Mad. 234.

3. *Padammah* v *Themana Ammah* (1894) I L. R. 17 Mad. 232.

4. *Krishnan* v. *Govindan* (1921) 41 M. L. J. 381.

5. *Unni* v *Kunchi Amma* (1890) I. L. R. 14 Mad. 26 ; *Anantan* v *Sankaran* (1890) I. L. R. 14 Mad. 101 ; *Chappan* v. *Ravu* (1912) I. L. R. 37 Mad. 420 ; *Kunhanna Shetty* v. *Timmaju* (1914) 27 M. L. J. 60.

6. *Padammah* v *Themana Ammah* (1894) I. L. R. 17 Mad. 232 ; *Parakandyilparkum Kishakkayil* v. *Kilath Puthiya Purayil Ahmad* 6 M. L. T. 157.

7. *Cheria Kunhi Pocker* v. *Malikaimal Valia Bappotty* (1919) 37 M. L. J. 514.

8. *Soopi* v. *Uppathumma* (1909) I L. R. 33 Mad. 31.

84. As a point of principle, it is a difficult question whether the anandravans may institute a suit for recovering possession of property which has been wrongfully alienated by the karnavan. Ordinarily, the karnavan is the person entitled to possession though in law his possession is the possession of the whole tarwad. When he has made an alienation which is not binding upon it, it is not open to him to sue to recover back possession of the property alienated, for the alienation is binding upon him. It is not a void act, in the sense that it is incapable of being ratified by the family. There can be no doubt that it is not open to any anandravan to recover possession of the property on his own behalf. But is it open to him to do so on behalf of the tarwad on the ground that the karnavan himself is disabled from suing to recover possession ? There are certainly difficulties in holding that he is entitled to do so. If an anandravan be allowed to recover possession on behalf of the tarwad, different anandravans may recover possession of different portions of the tarwad property, and the result would be to split the management of the tarwad and vest it in the hands of a number of its members. This is both contrary to the spirit of the Marumakkathayom law and beset with practical difficulties. On the other hand, if in such cases a suit for possession be not allowed, what is the remedy of the anandravans ? No doubt it is open to them to sue to remove the karnavan, and in that case, the succeeding karnavan would be entitled to recover possession of the alienated property. But suppose the Court refuses to remove him on the ground that though the alienation complained of is unjustifiable, the karnavan's misconduct has not been so grave or continuous or persistent as to justify his removal. How is the property then to be recovered for the tarwad, seeing that the karnavan himself cannot impeach his own alienation unless it is void in law ? One course that suggests itself is to hold that a decree may

be passed in favour of the karnavan in a suit instituted by an anandravan or anandravans. As already pointed out, in a suit of this kind by any anandravan, the karnavan and all the other members of the tarwad should be parties. The question is whether a decree can be passed in favour of a defendant alone. We are familiar with decrees in favour of the plaintiff and a defendant jointly, but a decree in favour of a defendant alone is certainly uncommon. But the objection is perhaps not applicable to the case, because it may be said that the decree is in reality in favour of the plaintiff also, for the karnavan's posssession is in law that of the whole tarwad. But it may be objected that the course suggested even if unobjectionable, does not provide a remedy adequate to the case. For if the karnavan continuing in his misconduct does not execute the decree, the tarwad will lose the benefit of the decree. Suppose the suit for possession is instituted after the alienee from the karnavan has been in possession for a period of ten years under his alienation, and a decree for possession is passed at the instance of the anandravan in favour of the karnavan who is a defendant in the suit. If the karnavan does not execute the decree, the right of the tarwad might be extinguished notwithstanding the decree, for the decree cannot affect the nature of the alienee's possession which has all along been adverse to the tarwad. If it would be legal to pass a decree vesting the property in the tarwad and directing surrender of possession to the karnavan-defendant, the effect of adverse possession till the date of the decree might be avoided, and if the karnavan neglects to execute the decree, the Court would no doubt remove him and the succeeding karnavan might be entitled to execute the decree as an assignee by operation of law. But it is very doubtful whether the Court can pass such a decree vesting the property in the tarwad, as it does in the case of appointment of a new trustee in suits under S. 92 of the Code of Civil Procedure.

85 According to the English practice there are cases in which one person may compel another to lend his name so as to allow a suit to be instituted in his name. Thus a beneficiary may compel a trustee to lend his name for asserting his legal right. But such a right does not exist in Indian Procedure. The Madras High Court has, in consequence of this difficulty, held that junior members may in such cases sue for possession on behalf of the tarwad. The question was raised in *Anantan* v. *Sankaran* [1] and Collins C.J. and Best J. observed "The karnavan is included as a defendant in this suit, and as he has failed to sue till the period of 12 years has almost expired, we are of opinion that the suit by the junior members cannot be validly objected to." The reasoning is not convincing. The same view was acted on in some previous cases, though the point was not raised or decided [2]. In subsequent cases it has been held further that a suit for a declaration cannot be maintained if the plaintiffs, the anandravans omitted to sue for possession [3]. This is hardly reconcileable with the decision in *Moidin Kutti* v. *Krishnan* [4] which holds that any individual anandravan may sue for a declaration that an alienation is not binding on the tarwad. An individual anandravan could not sue for possession in his own right. Such a suit could be instituted by the whole tarwad or by some of the members on behalf of the tarwad making the other members parties to the suit. [5] The right to a declaration and the right to possession are thus not in the same right. But it may be urged on

1. (1890) I. L. R. 14 Mad. 101.

2. *Sridevi* v. *Kelu Eradi* (1886) I. L. R. 10 Mad. 79.

3 *Bikutti* v. *Kalendan* (1890) I. L. R. 14 Mad. 267 ; *Padammah* v. *Themana Ammah* (1894) I. L. R. 17 Mad. 232 ; *Cheria Kunhi Pocker* v. *Bapputty* (1919) 37 M. L. J. 544. *Narayana* v. *Shankunni* (1891) I. L. R. 15 Mad. 255 *Chomu* v. *Sankara Belchampada* (1910) M. W. N. 498 where declaration was given as to Lands in family possession but refused as to properties not in possession.

4. (1887) I. L. R. 10 Mad. 322.

5. *Byari* v. *Puttanna* (1890) I. L. R. 14 Mad. 38.

the other side that the right to sue for declaration and the right to sue in those contingencies for possession on behalf of the family are in the same right in the same manner as the beneficiary has a right not only to have it declared that an alienation by a trustee is bad but also to have the property restored to the trust.

86 In Travancore, it was at first held that the anandravans could not be allowed to sue for possession. In Appeal No. 155 of 1058, Narayana Pillai and Kunhi Raman Nair JJ. observed : "To allow anandravans to recover and retain possession of family lands is to ignore the position of the karnavan and to reduce him to a nonentity. If the karnavan is acting against the interests of the tarwad, the remedy is by a suit to remove him." The Madras view, however, has been accepted in more recent cases. The Full Court held in *Manny* v. *Nilakantan* [1] that a suit for possession by the anandravans is maintainable. The Court observed: "A declaration by a Court that a given alienation by the karnavan is improper and not binding on the tarwad to which the property appertains does not do complete justice to the tarwad injured if such declaration is not to be followed by immediate retoration to it of the possession and a Court of Equity should not refuse to do complete justice." The Court expressed the further opinion that on the recovery of the possession by the tarwad, the karnavan would be entitled to hold and manage the property on behalf of the tarwad. The subsequent decisions of the Travancore High Court are in accordance with the view propounded in the above case. In Madras also it has been held that if the anandravan obtains a decree for possession, the karnavan would be entitled to obtain possession from him for management on behalf of the tarwad. [2]

1. (1895) 12 Tr. L. R. 211.

2. *Rama Kurup* v. *Shekara Kurup* (1910) 21 M. L. J. 87.

87 In proper cases the anandravan has also the right to sue for an injunction to restrain the karnavan from the commission of any act which is highly injurious to the interests of the tarwad. Such a right is possessed by a *cestui que trust* as against the trustee, when he can satisfy the Court that the trustee is about to proceed to do an act not authorised by the true scope of the trust [1]. Suppose a karnavan is about to dispose of the whole tarwad property wrongfully; it can hardly be doubted that the anandravan would be entitled to restrain him from doing so, and would not be compelled to wait until he completes the wrongful act and then sue to set aside the alienation. So the anandravan would be entitled to an injunction against waste. No doubt, a very strong case would have to be made out before the Court would be induced to interfere to restrain the karnavan in the discharge of the duties of his position. But there can be no doubt that the court possesses the power and would use it wherever necessary.[2]

88. The anandravans would not be entitled to sue for a mandatory injunction requiring the karnavan to act in a particular way, for that would be to ask the Court to substitute its discretion for his. All the anandravans, even if unanimous have no power to require the karnavan to act in a particular way, and they cannot seek to do so by means of a suit for injunction. It need hardly be observed that none but the karnavan can deal with the tarwad property, or act on behalf of the tarwad, however proper such dealing or act may itself be. Thus all the anandravans of a tarwad cannot contract a debt even in a most urgent case so as to bind the tarwad property. To allow them to do so would be practically to ignore the existence of the karnavan. [3] The Courts are however progressing towards the view that not only in cases

1. *Balls* v. *Strutt* (1841) 1 Hare 146 : 66 E. R 984.

2. *Puzhakkal Edom* v. *Mahadeva Pattar* (1917) 35 M. L. J. 96 but the act was held binding.

3. *Narayanan Nair* v *Narayanan Nambiar* (1916) 32 M. L. J. 489 ; (1917) M. W. N. 222.

of improper alienation but in all cases where the karnavan fails in his duty and either actively promotes or passively submits to an infringement of the family right, the other members have a right to intervene to redress the injury to the family interests. [1] Where an occasion arises for the exercise of this right by the junior members a right to pledge the credit of the family for the purpose also would be implied [2]. In a case like that there is of course, no scope for the application of the doctrine of inquiry, the validity of the charge being entirely dependent on the result of the junior member's action. If his interference is justified all reasonable expenses of such interference he can recover ; if he fails, the lender has to look to the individual member and none else [3]. On a somewhat similar ground it was held in S. A. 1285 of 1907 that where a karnavan abandons management others can sell for maintenance. Only exceptional circumstances can justify such a course.

1. *Anantan* v *Sankaran* (1890) I. L. R. 14 Mad 101 ; *Raja of Arakal* v *Cheria Kunhi Kannan* (1915) 29 M. L. J. 633

2. *Rama Kurup* v. *Shekara Kurup* (1910) 21 M. L. J. 87 ; *Raja of Arakal* v. *Cheria Kunhi Kannan* (1915) 29 M. L J. 633.

3. *Raja of Arakal* v. *Cheria Kunhi Kannan* (1915) 29 M. L. J. 633 ; *Rama Kurup* v. *Shekara Kurup* (1910) 21 M L. J. 87 ; *Govindan Narayanan* v. *Raman Govindan* (1895) 13 Tr. L. R. 155.

CHAPTER XII.

TAVAZHI OR BRANCH PROPERTY.

89. Tavazhi, meaning of—Sources of Branch property 90 Division for enjoyment, Maintenance, allotment etc—revocable when. 91. Powers of alienation etc., by Tarwad or Tavazhi. 92. Maintenance allotment how far bound by debts etc., 93. Deposition of manager of Branch property. 94. Supersession of family arrangement by majority vote 95 Inheritance, a source of acquisition 96. Gifts—a source of acquisition—From whom, 97. Circumstances in which gift to branch inferred. 98. Incidents of branch property. 99. Presumption as to acquisition.

89. Tavazhi literally means: Tayar-mother, vazhi-line, that is mother's line. Though every tarwad is that, the term is ordinarily used to denote one of the component parts of a tarwad consisting of a mother and her descendants. In *Chakkara Kannan* v. *Kunhi Pokker*[1] Mr. Justice Sadasiva Iyer says that etymologically, the term does not include the mother. But as understood at present, it includes her. The term cannot however be said to have acquired a definite signification; for sometimes the various branches into which a tarwad splits up with no *mudal sambhandam* or community of interest are also called Tavazhis, the main family retaining the name of tarwad. But this is not the ordinary use of either the term tarwad or Tavazhi. A tarwad in which "there is *Pula Sambhandham, i. e.*, community of purity and impurity but no *mudal sambhandam* or community of property" is a misnomer. The word Tavazhi is not employed in connection with a branch unless it owns some property also. One way in which a Tavazhi comes to own property is by division of Tarwad property for convenience of enjoyment. Another way, in which it comes to hold property is by inheritance. A third way is by gifts and other kinds of acquisition. The last kind of property when the donor is

1. (1915) I. L. R. 39 Mad. 317 (F. B.) : 29 M. L. J. 481.

the father is known as *Pitrarjakasam* property. In Travancore, such property is called *Makkathayam* property. Each of these different species of properties requires separate treatment.

90. As said above one way in which a Tavazhi comes to hold property is by division of the Tarwad property for convenience of enjoyment. When the family becomes too large for single management the properties are divided and the units adopted for separate allotment are usually branches. Even where absolute division takes place ordinarily it is only done as between branches, reserving a life interest for such of the members, as do not constitute a branch. So that one not very infrequent source of litigation is the dispute as to whether an alleged division is only a division for convenience of enjoyment or an absolute, out and out partition. The recent case of *Sulaiman* v. *Bayathumma* [1] is an instance in point. These arrangements are usually provided to last till the extinction of each branch but not unoften, no particular period is fixed for their duration and it is a question of considerable difficulty as to under what circumstances such arrangements can be revised. If the allotment be merely one for management and done at the instance of the karnavan of his own will, there could be no question it could be revoked by him at any time [2]. The ordinary presumption is that such allotments are revocable. If the allotment is one made by the karnavan for the maintenance of the branch then also the arrangement would be revocable by him [3], but he must make some other and suitable arrangement for the maintenance of the branch though the new arrangement might amount to no more than

1. (1976) 32 M. L. J. 137 (P C.)

2. *Valia Ilaimal* v. *Velluthadatha Shamu* (1871) 6 M. H. C. R. 401 *Nambiatan Nambudiri* v. *Nambiatan Nambudiri* (1864) 2 M. H. C. R. 110 ; *Govindan* v. *Kannaran* (1878) I. L. R. 1 Mad. 351 ; *Mahalinga* v. *Mariyamma* (1889) I. L. R. 12 Mad. 462.

3. Second Appeal 357 of 1887

calling upon the members of that branch to come to the family house and live there [1]. Where these arrangements are the result of a contract between the Karnavan and one or more members of the tarwad, it would not be open to the Karnavan of his own will to revise the arrangement [2]. It is open of course to the other members of the family to question the arrangement if it prejudicially affects their or family interests. Though the junior members may have to resort to courts to set aside the arrangement, the arrangement is not voidable in the sense that it would be binding unless set aside [3]. More frequently these arrangements are the result of binding family karars; in that case, they would not be revocable by the karnavan without recourse to Court. With reference to the question as to when the Courts might be justified in superseding these arrangements, the following distinctions may be of use :—i. The arrangement may be one for separate management primarily and separate enjoyment only subsidiarily but may purport to be a permanen arrangement. ii. It might be for separate enjoyment and intended to be permanent. iii. It might be a permanent arrangement for the maintenance of the branch. iv. Objects of the arrangements might be any of the above but the duration might be left indeterminate. In the first case, no separate interest is created in favour of each of the branches and as a act the arrangement would bind only the actual parties to it and children subsequently born would not be bound so far as their interests are adversly affected by it [4]. Again, in the last case also, the court might have power to interfere if having

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1. *Ramaswami Pattar* v. *Gopalan Nayar*. (1916) 32 M. L. J 97.

2. *Yakkanath Eachaya Unni Valia Kaimal* v. *Vasunni* (1909) I. L. R. 33 Mad. 436 :20 M L. J. 344 : 7 M. L. T. 107.

3. *Sankaran Nair* v. *Gopala Menon* (1906) I. L. R. 30 Mad. 18.

4. *Cf. Kelu Achen* v. *Lakshmi Nethyar Ammal*, (1913) 18 I. C. 234; *Pattu Nethiar Amma* v *Dharmam Achan* (1913) 21 I. C. 755.

regard to the changed circumstances, it should prove inequitable to hold parties to the original terms of the arrangement [1]. In fact, it may well be presumed that it is an implied term of every such arrangement that it should continue only so long as the conditions are not substantially changed [2]. The same however cannot be said of the other two classes of arrangements. In effect they amount to permanent alienation of the right of enjoyment and the courts would not have the power to alter them without the consent of the parties [3]. It may be that in the case of merely maintenance arrangements, very strong words are necessary before they are held to be unalterable because ordinarily, maintenance arrangements are alterable on material change in the circumstances. The change in the circumstances must however be material. The mere fact that the property yields a larger income cannot be a ground [4] in the absence of evidence that the circumstances of the family have so materially altered in point of numbers or in point of general wealth that the award of the high rate of maintenance involved in the arrangement makes it grossly unfair to the other members of the family. The case last referred to cannot be taken to exclude revision in those circumstances.

91. In respect of the properties, allotted as above, the manager of each branch must stand towards the individual members of the branch in the same relation, as the general manager towards the Tarwad [5], and his powers would be

1. Second Appeal 351 of 1881.

2. *Kelu Achen* v. *Lakshmi Nathiyar Ammal* (1913) 18 I. C. 234 at 235. But see *Yakkanath Echaraunni Valia Kaimal* v. *Vasunni* (1909) I. L. R., 33 Mad. 436 : 20 M. L. J. 344.

3. *Pattu Nethiar Amma* v. *Dharmam Achan* (1913) 21 I. C. 755.

4. *Yakkanath Eacharaunni Valia Kaimal* v. *Vasunni* (1909) I. L. R. 33, Mad. 436.

5. *Kenath Puthen Vitlil Tavazhi* v. *Narayanan* (1904) I. L. R. 28 Mad 182 at 193 : 14 M. L. J. 415 (P.C.) ; A. S. 31 of 1905 ; A. S. 48 of 1906.

measured by necessity. But so far as the other branches are concerned, the validity of the alienations would largely depend on the nature of the arrangements. In the case of assignment of lands for the support of the branch till its extinction or a permanent division for enjoyment, possession could not be obtained for the tarwad till the branch became extinct, any clause against alienation notwithstanding. But if the allotment is only for management and not for the absolute enjoyment of the branch, obviously other considerations would apply and the alienations would be upheld only to the extent they are permitted by the terms of arrangement, if any or, in their absence, their validity should be examined by the ordinary tests of necessity and the properties could be recovered for the family by any member of the tarwad, if the alienation fails to satisfy those tests. If the allotment is temporary or revocable the alienee's interest must cease on the revocation of the arrangement. Subject to what has been said above, where property is assigned for the maintenance only of a branch, the branch would have no power to bind the tarwad by its alienations by any appeal to necessity. Temporary assignments for maintenance would not make the property immune from the binding debts or obligations of the family [1], but permanent assignments might stand on a different footing especially in respect of obligations incurred subsequent to the assignment and independently of the branch.

92. The analogous case of the Hindu widow may be usefully considered in this connection. So long as the widow's claims are not fixed and she is residing with the family she is presumed to acquiesce in the *bona fide* dealings by the family with the family property and the creditors are entitled to proceed against it irrespective of her claims but when once they become fixed, though even thereafter she may be entitled to participate in the improvement in the family fortunes

1. *Parrakel Kondi Menon* v. *Kunni Penna* (1864) 2 M. H. C. R. 41.

and ' may in certain circumstances be affected by an adverse turn in them, neither the family nor the creditors can affect her rights. The interests of the junior members of the Malabar family are no doubt proprietary unlike those of the widow and also unlike in the case of the widow, the family management is in theory still conducted for their direct benefit. Giving due weight to these differences there still remains an element of similarity between the two cases and it would seem legitimate to hold that the property assigned would not ordinarily be liable for the family obligations which the branch in question has not joined in incurring. If circumstances justifying a revision of the maintenance arrangement exist it would be otherwise. Apart from the analogy above indicated there are two ways in which this result can be legally deduced. (i) In the circumstances the authority of the Karnavan and the other members of the family must be restricted to dealing with the remaining property and any obligation incurred thereafter should be held not binding on the maintenance allotment. (ii) As between the family and members in question and consequently as between persons claiming through the family and the members in question so much property must be deemed to be taken out of the category of family property, disposable for the ordinary purposes of the family. This is the view taken in Travancore [1].

93. In a recent case *Cheriya Pangi Achan* v. *Unnichan* [2] it is suggested that the courts cannot depose Karar managers when there is a *de jure* karnavan though with powers cut down yet not altogether deprived of them. The ruling leaves unaffected the liability of managers of branches to be removed at the instance of the members of the branch for whose benefit the properties are assigned. Just as the karnavan derives authority to deal with the tarwad property

1. *Aiyyappan Easwaran* v. *Narayanan Sankaran* (1894) 12 Tr. L. R. 133 ; *Narayanan* v. *Raman* (1897) 14 Tr. L. R. 49 (F. B.)

2. (1916) 32 M. L. J. 323 : 5 L. W. 302 : 38 I. C. 513 : 1917 M. W. N. 185.

from his natural position, the eldest member of the branch derives his authority to deal with the property assigned to his branch from his position as such eldest member and there is no reason in principle why the one should be liable to removal for mismanagement and not the other. Failure to recognise the possibility of a "co-parcenary within a co-parcenary" or to put it in the analogous Marumakkathayom terminology of a "tarwad within a tarwad" is responsible for much of the confusion in this branch of the law. The difficulty felt by Malabar lawyers in grasping this simple idea was due to the late recognition in that system of the capacity of the Tavazhi to inherit property.[1]

94. Another of the positions suggested in that case is that a family arrangement can be set aside without reference to court by a majority vote in the family council. Though this is extending the "corporation theory" of the family beyond the hitherto recognised limits, we may well recognise that the rule as ordinarily stated that the karnavan cannot revoke family arrangements of his own authority, but must resort to courts may require a re-statement. The rule really amounts to no more than this that the family arrangement cannot be put an end to by a karnavan arbitrarily as he can a concession made by himself but he can do so only on the coming into existence of circumstances that make a revision essential in the interests of the family and he may be assisted by a majority vote in persuading the court that it is so. Another proposition laid down in the case is that arrangement is good only for the life-time of the Karnavan who has agreed to be bound by it. But this presumption ought to be confined to cases where the arrangement is made primarily for the better management of the family lands. Where the arrangement is made with a view to more equitable enjoyment of the family lands or to

1. *Krishnan Nair* v. *Damodaran* (1912) I. L. R 38 Mad. 48 ; 24 M. L. J. 240, (F. B.)

provide for the maintenance of a branch, the presumption ought to be, that the arrangement is intended to continue till a substantial change in the circumstances occurs.

95. For a long time it was thought that in Malabar the Tarwad alone was entitled to inherit [1] but this is no longer the law [2]. In the case of women, their descendants inherit their property and hold it with the incidents of tarwad property [2]. Under the allied system, the Aliyasanthana Law of Canara, the self-acquisitions of individual members always descend on the Tavazhi in preference to the tarwad and the rule is, as stated in *Manjappa Ajri* v. *Marudevi Hengsu* [3], that the nearest Tavazhi succeeds-one's own Tavazhi in default of the mother's Tavazhi, in default, the grandmother's Tavazhi and so forth with rights of representation, etc. This right of representation is an advance on anything known to the Hindu Law under which it is confined to property inherited from lineal male ascendants. Malabar is much under the spell of group succession and if the tarwad is got rid of, it could only think of the next handy group, the Tavazhi, to succeed. That individuals can succeed is beyond doubt, but that is only when there are no groups to succeed. What is to happen if the group that would normally have been entitled to succeed to a certain property is split up into several minor groups ? All analogies point to the groups taking as tenants-in-common, each group however taking its share with incidents of tarwad property.

96. Another way in which the Tavazhi comes to own property is by gifts from father, or brother or uncle, for the matter of that gifts from anybody provided that the gift is intended to enure for the benefit of the branch as such and not merely for the benefit of the individual members. The only difference between the gifts last named and others is that whereas there is generally a presumption in the

1. *Govindan Nair* v. *Sankaran Nair* (1909) I. L. R. 32 M. 351.
2. *Krishnan* v. *Damodaran* (1912) I. L. R. 38 M. 48 : 24 M. L. J. 240 (F.B.)
3. (1915) I. L. R. 39 Mad 12 : 30 M. L. J. 204.

former case (the extent of the presumption will be presently considered) that the gift is intended to enure for the benefit of the branch, in other cases it must be made out to be so. The legal possibility of a gift to a branch with the incidents of tarwad property was once doubted but has since been affirmed in numerous cases. The question arose for the first time in *Narayanan* v. *Kannan* [1] where there was a gift by a father in favour of his wife and children and it was expressly provided by the donor that the property should be held with the incidents of Tarwad property. The High Court held that such a provision was invalid being repugnant to the grant. In *Kunhacha Umma* v. *Kutti Mammi Haji* [2] the Full Bench however over-ruled the case. It laid down that when there is a gift by a father in favour of his wife and children there is a presumption that the property is intended to be for the benefit of the branch to be held with the incidents of Tarwad property. This decision was by some felt to be unsatisfactory and various attempts were made to get round it. One suggestion was that it applied only to cases where the branch relinquishes its interest in the Tarwad property and thereby becomes a tarwad by itself [3]. This was qualified later on into one that the Tavazhi must have been living separately. The reason given was that joint tenancy outside joint family was unknown and the only joint holding (apart from tenancy-in-common) known to the law was holding by the tarwad. The genesis of this fallacy has already been traced. It was also argued that the Tarwad karnavan was the person bound to maintain the members and was the lawful guardian of the minor members and what, in those circumstances was to be the position of the Tavazhi karnavan ? Had he simply to

1. (1884) I. L. R. 7 Mad. 315.

2. (1892) I. L. R 16 Mad. 201 (F. B.) re-affirmed in *Chakkara Kannan* v. *Sinhi Pokker* (1915) I. L. R. 39 M. 317 : 29 M. L J. 481 (F. B.)

3. *Kenath Pullen Vitlil Tavazhi* v. *Narayanan* (1904) I. L. R. 28 Mad. 182 ; *Ummanga* v. *Appadorai* (1909) I. L. R. 34 Mad. 387 : 20 M. L. J. 218.

draw the income and accumulate it or was he entitled like the tarwad Karnavan (as was said of him in some cases) to have uncontrolled powers of disposition over the income? This doubt has since been set at rest by the Full Bench in *Chakkara Kannan* v. *Kunhi Pokker* [1] which holds that the junior members are entitled to have maintenance from the branch property. This aspect of the case will be more fully developed when considering the incidents of tarwad property that apply to this kind of property. Another and more substantial objection was that in the case of Marumakkathayom people the possibility of the wife taking another husband and having children by him must always be present to the mind of the donor and the intention of benefitting these latter cannot be expected of him. The answer that may be given is that while the view that the branch is to take might occasionally give other people the benefit of the grant (who would have it, even if the other view is taken, as descendants of the mother when succession opens out on the mother's death, the alternative view would almost always give an unfair preference to the children in existence at the time of the grant. Mr. Justice Sadasiva Aiyar makes a bold suggestion that sub-tavazhis consisting of a woman and her children by a particular husband might be recognised. There is no reason why the hitherto accepted legal categories must be considered exhaustive. It was once thought as to easements that their number could not be added to; the Privy Council has told us that this is a wrong notion. Certain ideas were prevalent in England as to fishery rights in rivers etc. The Privy Council has deprecated the application of those ideas to Indian conditions. It is an accepted idea in England that unincorporated bodies like a village or a community cannot hold property. This is not the view taken in India. There are many other directions in which what one should have

1. (1915) I. L. R 39 Mad. 317 : 29 M. L. J. 481.

thought were fundamental ideas of English jurisprudence have been held to be inapplicable to Eastern conditions. On the whole we think it is more a question of usage than of positive legal theory. If, as a matter of fact, properties are held by such groups, there does not seem to be any insuperable barrier to giving effect to the usage. It has been since held that the property would enure for the benefit of only the children of the donor [1].

97. Though it may be taken to be settled that a branch can take property with incidents of Tarwad property, there is considerable scope for doubt as to the exact circumstances in which the inference that the gift is one to the branch will arise and as to the incidents of Tarwad property that will appropriately attach to such property when held to belong to the branch. Putting aside the case of a grant to a branch as such, and the case of a grant by a father to his wife and children merely or to wife and all the children then existing or after the death of the wife to all the children which is governed by the Full Bench in *Chakkara Kannan* v. *Kunhi Pokker* [2], it can by no means be said to be clear under what other circumstances the inference will be made. However, the inference has been drawn in a case where the gift was by the uncle to his nieces, the mother being dead [3]. Having regard to the usual origin of Tavazhi property from fathers, uncles and brothers as stated by Mr. Justice Sankaran Nair in *Chakkara Kannan* v. *Kunhi Pokker* [4] it would seem legitimate in all those cases to draw the inference. In fact, Mr. Justice Sankaran Nair states in his judgment in *Krishnan Nair* v. *Damodaran* [5] that such property is intended for the woman and her children. If the gift is to a sister and her children, the sister and her childern

1. *Imbichi Beevi Umma* v. *Raman Nair* (1919) I. L. R. 42 Mad. 869 : 37 M. L. J. 220.
2. (1915) I. L. R. 39 Mad. 317 : 29 M. L. J 481.
3. L. P. A. 19 of 1916.
4. (1915) I. L. R. 39 Mad. 317 at 322 : 29 M. L. J. 481.
5. (1912) I. L. R. 38 Mad. 48 at 56.

will take as a branch ; if it is to all the sisters, they will not take it as a tarwad unless at the time of their taking it, they are the sole members of the branch. However if it is clear that the sisters and their children are intended to take, the intention of the donor can be given effect to by taking the grant as a grant to the sisters as tenants-in-common but each sister to take her share as Tarwad property. The analogy of *Nagalingam* v. *Ramachandra Tevar* [1], would justify the raising of the inference in all cases in which the donees would in the absence of a gift in their favour, take as heirs. It may be a question for consideration where a transfer is to all the members of the branch whether on the principle of Hindu Law that *joint acquisitions* of all the members of a family are presumed to be family property, the property should not be presumed *prima facie* to be property of the branch. Where the acquirers represent only one generation, the presumption may be weaker than when several generations are mentioned as donees, though the presumption may arise notwithstanding that some do not join. Now suppose the gift is by the relations mentioned above but the gift is in the name of only one or some of the members of the branch then existing. What is to be the presumption ? The law on this question is not quite settled though according to the Full Bench, when the gift is to wife and children, the conferring of the power of alienation &c., is an immaterial circumstance. As the question is one of construction of the grant with reference to the surrounding circumstances, if the words of the gift are clear that the gift is intended for the exclusive benefit of the donee, then the presumptions raised by the Full Bench are necessarily excluded and the donee will take absolutely. Similarly if the words are clear or from the surrounding circumstances the inference is clear that the grant is to the donee as representing the branch then also, the presumption raised in some cases in

1. (1901) I. L.R. 24 Mad. 429.

favour of exclusive gift would not avail. Subsequent dealing with the property might undoubtedly be of use in determining whether the gift was made or accepted on behalf of the branch. Apart from all other circumstances, in the case of gifts by father, uncle or brothers it seems to be a proper presumption to raise that when the gift is made to a person who ordinarily or in law represents the branch, he takes it on behalf of the branch and the presumption must be more readily drawn when there is already property in his management as representative of the branch. In two cases *Narasama Hegadithi* v. *Billakesu Pujari* [1] and *Duja Bhandari* v. *Venku Bhandari* [2], it has been held that a gift to a wife alone (when there are children alive) must be taken to be to her absolutely, while in another case it is said that the fact that the transfer stands in the name of the eldest male and the eldest female might be an indication that the acquisition was intended for the branch [3]. If there were two gifts on the same day one in favour of the mother and another in favour of the eldest son the presumption would be that either the one or the other, preferably the latter was not intended for the branch, but if the interval between the two is long the presumption is weak. In *Kalliani Amma* v. *Govinda Menon* [4], a gift to the wife was held to enure for the benefit of the children though they were not mentioned in the deed In *Naku Amma* v. *Raghava Menon* [5] Mr. Justice Miller thought a gift to a woman *simpliciter* by the husband without words of alienation or inheritance was a strong circumstance in favour of the branch. In *Paru Amma* v. *Ittiheri Amma* [6] Coutts Trotter and Srinivasa Iyengar, JJ. thought that express grant of the power of alienation to the donee was conclusive in favour of exclusive gift to the donee.

1. (1913) 25 M. L. J. 637.
2. (1915) 31 I. C. 854.
3. *Ummanga* v. *Appadorai* (1909) I. L. R. 34 Mad. 387.
4. (1911) I. L. R. 35 Mad. 618.
5. (1912) I. L. R. 38 Mad. 79.
6. (1915) 32 I. C. 459

In view of the Full Bench decision above referred to this circumstance cannot be considered conclusive. Applying the rule to Aliyasanthana cases, when the mother is alive (who is the de jure manager of the branch) a gift in favour of the eldest son ought not to be presumed to be for the benefit of the branch ordinarily and in the absence of evidence that he is managing other properties of the branch. It should be otherwise in a Malabar family where the eldest male represents the branch. It has been held that where the gift is to a woman, it is not essential that it must expressly purport to be for the benefit of herself and her children though it is possible that in the absence of such a statement when there are children in existence, the gift may be held to be hers exclusively. In Travancore, the presumption is raised when gift is in the name of the mother or the eldest son[1]. A few of the members of a branch cannot hold property with the incidents of a Tarwad and a grant to them can only be as tenancy in common [2].

98. The next question, which is not altogether settled is as to the incidents of the tarwad property that can appropriately be held to attach to this type of property. The following incidents have been held to attach to the property : (i) impartibility and inalienability of individual member's shares; [3]. (ii) single management ; [4]. (iii) survivorship; [5]. (iv) right

1. (*Koshi Thoma* v. *Narayanan Krishnan* (1907) 22 Tr. L. R. 239.

2. *Chakkara Kannan* v. *Kunhi Pokker*, (1915) 1, L. R. 39 Mad. 319 at 336 S. A, 109 of 1919.

3. *Kunhacha Umma* v. *Kutti Mammi Hajee* (1892) 1, L. R, 16 Mad. 201 : 2 M. L. J. 226 (F. B.) *Chakkara Kannan* v. *Kunhi Pokker* (1915) I. L, R, 39 Mad. 317 : 29 M. L. J. 481 (F. B,) *Pattatherwath Pathumma* v. *Abdulla Haji* (1907) I. L, R. 31 Mad. 228 : *Kunhamina* v. *Kunhambi* (1908) I. L. R. 32 Mad, 315.

4. *Abdulla* v. *Chekkutti* (1910) 20 M. L J 368; *Parvati Kuttilammah* v. *Ramachandra Ejaman* (1910) M. W. N. 124.

5. *Korth Amman Kutti* v. *Appu Nambiyar* (1906) I. L. R. 29 Mad, 322 ; *Chakkara Kannan* v. *Kunhi Pokker* (1915) I. L. R. 39 Mad. 317 : 29 M. L, J 481 (F. B.) *Kunhacha Umma* v. *Kutti Mammi Hajee* (1892) I. L. R, 16 Mad. 201 : 2 M. L. J. 226 (F.B.)

of the member subsequently born; [1]. (v) right of maintenance of junior members; [2]. (vi) liability of the managing members to be removed [3]. As regards maintenance though it has been decided that for the award of maintenance from the branch property, it is not necessary that the tarwad should be unable to maintain the members, it is yet a doubtful question how far the ordinarily understood limitation on the right to maintenance, viz., that the member should reside in the tarwad house applies to the right to maintenance from the branch property. If that condition should be considered to inhere to the right of maintenance from the branch property, the very object of such gifts one should think, would be frustrated for in that case in the absence of some maintenance arrangement in the Tarwad the benefit of both properties can never be had by any other member that the manager. Duty to reside in the family house is a duty cast on the junior member and he cannot be deprived of his right to maintenance from the branch property for his due observance of his duty. Viewed from another point of view also, the same result follows. In respect of conflicting rights and duties, the tarwad being the body of which the branch is only a part the rights of the tarwad and the tarwad manager must have preference. If the right of guardianship inheres under the customary law in the Karnavan, the branch karnavan cannot have it. Similarly, the right to regulate the movements of the junior members on which really the duty to reside in the family house hangs vests in the karnavan and the branch karnavan cannot have it unless it has been lawfully delegated by the karnavan. This is true not only of this type of property but also of

1. *Kalliani Amma* v. *Govinda Menon* (1911) I. L. R. 35 Mad. 648 : 22 M. L. J. 23. *Katankandi Koma* v. *Sivasankaran* (1909) 20 M. L. J. 134.

2. *Nakn Amma* v. *Ragava Menon* (1912) I. L. R. 38 Mad. 79 ; *Chakkara Kannan* v. *Kunhi Pokker* (1915) I. L. R. 39 Mad. 317 : 29 M. L. J. 481 (F. B.)

3. *Parvati Kattilammah* v. *Ramachandra Ejaman* (1910) M. W. N. 124.

maintenance allotments for the branch though it would be different in the case of allotment to the branch of the portions of family property more or less permanently for its enjoyment or management. It is again extremely doubtful if the rule as to non-accountability in its extreme form really applies to the branch manager in respect of these properties or in any other case when there has not been at least *pro tempore* investing of the branch manager with the Karnavanship in respect of the branch property. The duty and the right of the branch manager is only to manage the property. Non-accountability of the karnavan even, is in truth but a fetish. What is really meant is that he is not like a trustee liable to keep accounts and bound to justify every act of his. He has a large discretion in the utilisation of the family funds for purposes of the family subject to certain imperative duties such as maintaining the junior members, etc.; as between the several purposes, he may starve one and favour another and he has also a large discretion in determining what is for the family benefit. He has to protect the members of the family, look to their marriage and education and generally look to the religious and other interests of the family. With the range of duties that he has to perform and the discretion that he has in the selection of purposes and the amounts to be spent, taken with the rule that for mere carelessness, want of superior capacity or small lapses he will not be removed, in practice he has large and uncontrolled powers. Except in this way it is perfectly clear that he has no larger beneficial interest in the income than an ordinary member. It is now settled that he cannot use the family income for any purpose other than a family purpose. In the case of a branch manager, owing to the smaller range of his duties, and the objects for which the fund in his charge can be applied, it may be, his control, in practice, is less large though in strict theory there is no difference between the two cases.

99. The next point on which there is room for considerable doubt is as to the presumption as to acquisitions. The ordinary presumption is that the property standing in the name of a junior member is tarwad property. What is the presumption where the acquisition is in the name of a member of a branch which owns properties? Where the property is allotted to the branch for management by the tarwad, it is perfectly clear that the ordinary presumption would apply. If the property is assigned only for maintenance the presumption, one should fancy, is to be the other way, for maintenance is a personal or individual right and savings if any made by the member or the branch must be presumed to belong to the member or the branch rather than to the tarwad. Coming to the case of Putravakasam property, solution of the conflict of presumptions that must arise would be one of some nicety. The possible cases that might arise with respect to this are (i) as between the tarwad and the branch, (ii) as between the tarwad and individual members of the tarwad setting up branch title, (iii) as between the branch and the individual members of the branch setting up self-acquisition (iv) as between the branch and its individual members setting up tarwad title. The first case is really analogous to the ordinary case of a dispute between a tarwad and an individual member uncomplicated by any question of branch. It is a case of self-acquisition set up by the branch and it is for the branch to prove self-acquisition. It will have to prove a possible independent source of acquisition and non-user of family funds. The presumption being one of fact, both or either of the circumstances might suffice to repel the inference. If the branch has family property in its possession the burden would be heavier on the branch to prove self-acquisition. The difficulty would really arise where the branch has not family property in possession but its manager has. In its ultimate analysis the basis of the presumption in favour of family property will be found to be (i) possession of family funds, (ii) capacity to throw

into the common stock (iii) duty to account. In the case in question the second condition is not existing for it is not open to a single member though manager to give up the rights of the junior members. Under these circumstances, there should be no presumption either way and it should be for the party setting up the one or the other case to establish the case put forward by him. The second case, again, is not much different from the case of a tarwad and ordinary member. It is analogous to the case of a junior member owning self-acquisitions. In the third case, the burden should be on the junior member to show that it is his self-acquisition. Whatever difficulties there might be when there is a conflict between the tarwad and the branch, it is certainly for the junior member to show that the property is his self-acquisition but the fourth case is not so quite easy. This case is analogous to the first. Though where the conflict is between the branch and the tarwad, it may be that there would be no presumption, that is no reason why the individual members should take the benefit of the state of things when they do not represent the tarwad. It is for them to show out of which fund they got it and in the absence of evidence, it is the more legitimate presumption that they acquired it out of the branch funds over which they have a larger beneficial interest than out of the property; the presumption ought to be stronger when the member concerned is the manager of the branch. In some earlier cases, it was held that there was no presumption in favour of the branch unless the branch withdrew itself from the tarwad and lived separately. This was as a part of the general theory that the presumption of branch property with incidents of tarwad property would not arise unless those conditions applied; so far, those cases are no longer law. But even under those conditions in *Mari Vittil Chathu Naïr* v. *Mari Vittil Sekaren Nair.*[1] Sir Aronld White, C. J. and

1. (1909) I. L. R 33 Mad 250 : 20 M. L. J, 86.

Krishnaswami Iyer, J. thought that where possession of tarwad funds is negatived, the acquisition by the manager of the branch is to be presumed to be that of the branch. The proposition as stated in the earlier cases seems however to possess this valuable element of truth that where the branch has a separate residence and is, in fact, living as a tarwad practically for all purposes, the presumption in favour of the branch should be more readily drawn than in the other cases.

CHAPTER XIII.

INDIVIDUAL PROPERTY.

100. Presumption of joint family acquisition. 101. Some complications—how presumption affected. 102. Junior members—presumption if applies. 103. Presumption, no application to gifts. 104. Powers of disposition. 105. Modes of acquisition.

100. As under the Hindu Law, so under the Marumakkathayom and Aliyasanthana systems joint holding is the rule and individual holding the exception and it is for the individual member who sets up separate title to make it out [1]. The strength of the presumption would no doubt vary according to circumstances. A karnavan who is in possession of family funds for instance, would be presumed to have made all his acquisitions with them for the benefit of the family and in his case the presumption would be very strong [2]. The discussion as to a nucleus and the burden of proving its existence or the contrary is common to the ordinary Hindu Law and these systems. If it is proved that there was no family property from which the property in question could have been acquired, that undoubtedly would rebut the presumption of family acquisition but it is not sufficient to show that the family funds alone cannot account for the acquisition [3]. For it must be borne in mind that when there is a mixing up of the family funds and separate funds the presumption is that the latter is merged in the former. As under the

1. *Mari Veetil Chathu Nair* v. *Mari Veetil Sekaran Nair* (1909) I. L. R. 33 Mad. 250 ; *Vira Rayan* v. *Valia Rani* (1881) I. L. R. 3 Mad. 141 ; S. A. 970 of 1883 ; S. A. 1150 of 1883; *Govindu Panikkar* v. *Nani* (1911) I. L. R. 36 Mad. 304 (foot note) ; *Thimmakke* v. *Parameshri* (1910) M. W. N. 297 : 7 I. C. 145 ; *Dharma Shetty* v. *Dejamma* (1916) 5 L. W. 259.

2. *Kallati Kunju Menon* v. *Palat Erracha Menon* (1864) 2 M. H. C. R. 62 ; *Kunhanna Shetty* v. *Timmaju* (1914) 27 M. L. J. 60.

3. *Thimmakke* v. *Parameshri* (1910) M. W. N. 297 : 7 I. C. 145.

Hindu Law, an inconsiderable contribution from the family funds may not affect the nature of the acquisition. It could not in those circumstances be said that the family property was instrumental to the acquisition [1]. As said in books of Hindu Law "things of ordinary value may be given up for they are mere chaff" (*de minimis non curat lex*); for instance in the practice of agriculture, it is said, taking a rope for his plough out of the common stock would not invalidate his pretensions to an exclusive right. Nor would the fact that the money is raised on the credit due to the relation of the manager to the family property be a reason for holding that the property acquired is family property. It would be otherwise if the amount is raised by pledging the family property. A member of the family making improvements on the family property, [2] or raising crops on the family property, [3] cannot of course claim them. They will be regarded as accretions to the family property; it would be otherwise if the lands were held on lease from the family. Acquisitions out of maintenance allowances or out of the income of the family allotted for that purpose should be similarly treated as self-acquisitions. The case may vary if it is only an improvement of the family property in his possession for maintenance, for then the simple case would be complicated by the principle of merger.

101. Modern conditions are likely to raise more complicated problems. The following are some such. Suppose the managing member purchases property in his own name as self-acquisition or in the name of another intending to make gift to that other partly with family funds and partly with his own funds. If the purchase is entirely with the family funds according to the principles of Hindu Law and of S. 63 of the Indian Trusts Act, the acquisition will enure for the

1. Strange Vol. I p. 213 : *Lakshman Mayaram* v. *Jamnabai* (1882) I. L. R 6 Bom 225.

2. *Kanna* v. *Tenja* (1882) I. L. R 5 Mad 1.

3. *Vishnu Nambudiri* v. *Akkamma* (1910) I L R. 34 Mad 496 : 20 M. L. J. 938.

benefit of the family, but in the case put, is the principle of S. 66 of the Ttusts Act giving a charge to the family to be applied or should the property be held to belong to the family? Again suppose the managing member starts a venture with the family funds and succeeds by expending his labour and skill in making it a big success; is the family to be entitled to the whole business or is it to be held entitled to the funds contributed with interest or corresponding profits at its option? Here again, at the time of starting the business the manager may have disclosed his intentions with regard to the business whether it should be his own private concern or that of the family or there may be circumstances from which his intention may be inferred. Among the circumstances pointing one way and the other would be his raising money by pledging the credit of the family, or on his own personal credit, treating the capital contributed by the family in the books of business as capital or only as a loan, the nature of the investment whether authorised or unauthorised, participation of the family members in the conduct of the business etc. The managing member is not bound to contribute his labour, skill or capital for the benefit of the family but if he does not declare his intention to reserve the benefit for himself he will be presumed not to do so. If he declares his intention to reserve it, the capital he would certainly be entitled to have [1]. Whether he should have the improved fund for himself and whether he would be entitled to get the benefit of his labour and skill would depend upon circumstances. The test in such a case, should be what is substantially instrumental in the acquisition of the new property. If the capital is the main thing and the family has contributed it in spite of the declaration of the intention to charge for labour and skill the family should get the property. For, in the absence of a contract, the managing member would

1. *Thimmakke* v. *Akku* (1910) I. L. R. 34 Mad. 481.

not be entitled to charge for his services and where the result of his services is not separable from the family fund, he cannot have any portion of the improved fund. But when his own capital forms the bulk or his labour and skill form the chief or the main cause of the new fund, the family should only be entitled to the fund contributed with interest or proportionate profits at their option. In cases of doubt where it is difficult to say whether it is the capital or the skill that is the main cause, having regard to the fiduciary position of the Karnavan the family should have the benefit of the doubt. Where a deceased partner's share is continued to be used in the partnership, the rule followed is that the representatives are given at their option interest on the fund or the share of the profits than can appropriately be assigned to the capital contributed, proper deduction being made for the skill and labour of the surviving partners. The privileges and immunities attaching to the position of the managing member require that he should not be permitted to get any remuneration for his services unless he is able to show that his labour and skill are the main causes of the acquisition. Applying the same principles, where the property is purchased of a mixed fund and the family contribution forms the bulk, the family should have the benefit of the property and the member only a charge for his money.

102. The presumption above referred to applies equally strongly to junior members who are in joint or exclusive management of the family property or otherwise have the handling of the family funds [1]. In Travancore the presumption is that property standing in the name of the junior members belongs to them exclusively and the family has to show that they had management or the handling of family

1. *Sanku* v. *Puthumma* (1890) I. L. R. 14 Mad. 289 ; *Thimmakke* v. *Akku* (1910) I. L. R. 34 Mad. 481 ; *Thimmakke* v. *Parameshri* (1910) M. W. N 297 ; 7 L. C. 145.

funds [1]. In British India, on the other hand, the presumption is stated to be the other way in a number of cases referred to at the beginning of this chapter. In *Govinda Panikkar* v. *Nani* [2] Benson and Sundara Iyer, JJ. however state, "We do not understand these cases as laying down that there is any presumption of law either way. The presumption is one of fact and whether a presumption in favour of the property being Tarwad property should be drawn or not in any particular case would depend on various circumstances such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition, the possession of private means by the junior member, the existence of any family funds that existed at the time of the acquisition which disappeared after the acquisition." In *Thimmakka* v. *Parameshri* [3] the learned Chief Justice is not prepared to say that the presumption is one of law. But it must be noticed that in the leading case on burden of proof, *Dhuram Das Pande* v. *Mussammut Shama Soondari Debia* [4] which has been followed by the Privy Council quite recently in *Parbati Dasi* v. *Baikunta Nath De* [5] case their Lordships say the presumption is stated to be a presumption of law. There Lord Campbell says: "It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property and that there can be no doubt that under these circumstances, the presumption of law is that all the property they were in possession of was joint property until it was shown by evidence that one member of the family was possessed of separate property." In *Parbati Dasi* v. *Baikunta Nath De* [5] "there was no evidence that Rup Charan had any separate

1. *Kanaku Parameswaran Kesavan* v. *Govindan Kumaran* (1905) 22 Tr. L. R. 121; *Raman Govindan* v. *Parvati Pillai Devi Pillai* (1907) 22 Tr. L. R. 178 (F. B.); *Narayanan Ramen* v. *Govindan Kesavan* (1911) 26 Tr. L. R. 190 (F. B.)

2. (1911) I. L. R. 36 Mad. 304

3. (1919) M. W. N. 297.

4. (1843) 3 M. I. A. 229.

5. (1913) 26 M. L. J. 248.

funds or that the properties in dispute were purchased with money belonging to him. In the absence of such evidence the presumption is clearly decisive that they were acquired by the father in the name of the son and that they were not the self-acquired properties of Rup Charan (junior member)". Referring to this case and explaining *Govinda Panikker* v. *Nani* [1] Sir John Wallis, C. J. and Burn, J. say in *Dharma Shetti* v. *Dejamma* [2] " we understand the learned Judges in *Govinda Panikker* v. *Nani* [1] merely lay down that the right way to approach the case is to look at all the facts and the circumstances of the particular case and raise the presumption accordingly. The view of the District Judge is opposed to the very recent decision of the Privy Council in *Parbati Dasi* v. *Baikuntha Nath De*[3] " The view of the Judge based on *Govinda Panikker* v. *Nani* [1] which was dissented from was that there could not be any presumption that the properties were Tarwad properties unless the particular member was shown to have no private means or the family was shown to have had funds which disappeared after acquisition. In the absence of proof of nucleus the presumption would, of course, be of the most attenuated character but where a possible source of acquisition is proved, the effect of the Privy Council decision would seem to be to throw the onus on the junior member to show that he either had separate funds or that the property was purchased out of separate funds. He may perhaps also show that no family property was in his possession or that even if it was, it was too insignificant to have substantially contributed to the acquisition. In the case of the karnavan, a higher degree of proof than mere possession of separate funds should be required. The ratio of the presumption in the case of the junior member is traced in *Virarayan* v. *Valia Rani of Pudia Kovilagom* [4] in effect to the general practice

1. (1911) I. L. R. 36 Mad. 304 : 21 I. C. 211. See also *Subramania Pattar* v. *Krishna Embrandiri* (1920) 39 M. L. J. 590.

2. (1916) 5 L. W. 259.

3. (1913) 26 M. L. J. 248.

4. (1881) I. L. R 3 Mad. 141.

of handing over the management of portions of family property to junior members. As a point of history it may have deeper roots. The old theory referred to in Manu of sons, wife and slaves being *Nirdhana* (i. e. without property) and their property belonging to the head of the family may be the real source of it. It will be seen that the karnavan's position, and even the history of its evolution present many analogies to that of the father under the Hindu Law. If at all, the authority of the karnavan is not less but more absolute than that of the father.

103. The presumption above referred to can ordinarily have no application to gifts. In the case of *Putravakasam* gifts some such presumption is applied in Travancore [1] but the British Courts have not yet done so. Gifts to wife and children though children are not in existence at the time are no doubt held to be branch property but this is really not an exception. This aspect of the case has already been discussed while considering Branch property. The presumption cannot have application to transactions in which family funds are not used or at least family interests are not involved. The karnavan taking, for instance a land from strangers on *Verumpattam* lease could hardly be presumed to be acting for the family but the lease of a land on which the family has been living or of land though alienated in which the family still retains some interest and hopes some day to redeem might stand on a different footing [2]. Acquisition of property would not be one of the duties of the karnavan except as a method of investing family funds or unless personal needs of the family require it, the more so where the acquisition is one of an onerous or speculative kind. In the case of grants from government on darkhast by reason of contiguity to family land or cultivation at family expense courts would readily infer, of course, acquisition

1. *Koshy Toma* v. *Narayanan Krishnan* (1907) 22 Tr. L. R. 239.
2. *Kunhanna* v. *Mankuchetty* (1920) 30 M. L. J. 25.

in a representative capacity. It is only when the acquisition does not involve any detriment to the family, not necessarily to family property (detriment to family goodwill will suffice) that the court will infer a grant to the karnavan individually. As held in *Subbayya* v. *Chellamma* [1], even where the acquisition is gratuitous, if the property is subsequently improved the burden would be on the manager to show that the improvement was not at the family expense and the property had not thereby become family property. It is doubtful if ordinarily these considerations will apply to acquisitions on darkhast by junior members not in possession of family property and without the connivance of the manager.

104. As under the Hindu Law, once the prevalent theory under the Malabar Law also was that the karnavan could not alienate immoveable property acquired by himself [2]. The same rule was applied later on to acquisitions of all members. [3] But in 1863, Phillips and Holloway, JJ. held that "self-acquisitions are his separate property and may be charged by him for his personal debts."[4] But at the same time they retained so much of the old theory, *viz.* that after his death, they lapse into the Tarwad property. In *Kallati Kunju Menon* v. *Palat Erracha Menon* [5], the same proposition was reaffirmed by Scotland, C.J. and Holloway, J. There they say " it is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death, form part of family property that they do not go to the nephews of the acquirer but fall as all other property does, to the management of the eldest surviving male. It is, however, as unquestionably law that the acquirer is fully entitled to hold, encumber and dispose in his life-time of his self acquisitions." This doctrine of lapse, Mr. Justice Holloway had already applied to ordinary Hindu co-parcenaries in

1. (1886) I. L. R. 9 Mad. 477. 2 Second Appeal 27 of 1859.
3. S. A. 88 of 1859 ; S. A. 85 of 1860. 4. Moore's Malabar Law p. 175.
5. (1864) 2 M. H. C. R. 162.

Varadiperumal Udayan v. *Ardanari Udayan* [1], but was overruled by the Privy Council in *The Sivaganga case* [2]. His dictum in *Kallati Kunju Menon* v. *Palal Erracha Menon* [3], as to lapse was however followed by Innes and Muthuswami Iyer, JJ. in S. A. 534 of 1878 where it was ruled that the acquirer could not dispose of his self-acquisition by will. Nevertheless they held that the Tarwad was liable for the debts of the acquirer. In *Ryrappan* v. *Nambiar Kelu Kurup* [4], the bearing of *The Sivaganga case* [2] was noticed by Innes and Muthuswamy Iyer, JJ. but their Lordships still refer to the property as lapsing to the Tarwad. However they draw the right inference therefrom, *viz.*, that the property is taken by the Tarwad as heirs of the acquirer. In *Alami* v. *Komu* [5], the will of the last surviving member of a Tarwad was upheld. Mr. Justice Muthuswami Iyer relies for that conclusion upon *The Sivaganga case* [2] and his own decision in *Ryrappan Nambiar* v. *Kelu Kurup* [4]. In *Kattyassan* v. *Mayan* [6], the point again arose but was left open. In *Achutan Nair* v. *Cheriotti Nayar* [7], the point was again directly raised and it was decided that self-acquired property could be disposed of by will. The result was arrived at by the application of the following principles (1) that the acquirer could dispose of the property by gift *inter vivos* (2) that the Tarward had no joint interest therein, (3) that whatever a dispose of by gift *inter vivos* he could dispose of by will. The rule laid down in this case was adopted by the legislature in Madras person could validly Act V. of 1898. (*See* Appendix.)

105. The other species of individual property usually met with are (a) property allotted at partition (b) tarwad property

1. (1863) 1 M. H. C. R. 412.
2. (1863) 9 M. I. A. 543.
3. (1864) 2 M. H. C. R. 162.
4. (1881) I. L. R 4 Mad. 150.
5. (1888) I. L. R. 12 Mad. 126.
6. (1891) I. L. R. 14 Mad. 495.
7. (1897) I. L. R. 22 Mad. 9.

in the hands of the last surviving member (c) inherited property. When property is inherited by undivided groups, they will of course take as groups with the incidents of Taward property but where the individuals composing them are divided *inter se* or where there is only one individual entitled to inherit, inheritance becomes a source of acquisition for individuals. So far as power of disposition *inter vivos* or testamentary is concerned these distinctions do not matter. One other mode ot acquisition which needs consideration lis prescription. Ordinarily of course this mode of acquisition stands on the same footing as gift but if the title set up is family title, or the circumstances are such as to raise the inference of prescription for the family, the benefit of the prescription accrues to the family. For instance where the family is the lessee, and the karnavan encroaches on adjoining waste land the very psesumption of law that makes it a part of the holding would make it also a part of the family property. These questions are by no means peculiar to Malabar Tarwads, and the same solutions would answer for both the Malabar and the ordinary Hindu systems.

CHAPTER XIV.

INHERITANCE AND SUCCESSION.

106. Testamentary disposition —Power of—Madras Act V of 1908 107 Classes of heirs—Tests of propinquity—Travancore Law-108. Marumakkathayam and Aliyasanthana Law—Rules as to. 109. Convert's rights. 110. Piebald system. 111. Inheritance under Malabar Marriage Act. 112. Leprosy —Insanity—No disqualification.

106. When dealing with the power of testamentary disposition over self-acquired property the question of testamentary succession has been in a way dealt with. In *Alami* v. *Komu* [1] the learned Judges go fully into the matter and show that wills were common from very early times in Malabar. There is an allusion to the practice in Major Walker's Report in 1802 and a similar allusion also in the Fifth Report. The wills produced in the case dated from 1826. There does not seem to have been any doubt at any time as to the power of willing away property in the absence of heirs. In 1837 a will bequeathing self-acquisition to nearer heirs to the exclusion of remoter ones was upheld. In 1843 the Sudder Court thought apparently that all property could be willed away if no title thereto in the claimant during the acquirer's lifetime, was made out. As to self-acquisition, there was a veering of opinion subsequently but ultimately power of disposition was admitted. The last surviving member's right was established in *Alami* v. *Komu* [1]. The case of such property could hardly be distinguished in principle from that of property alloted at partition. But all this discussion is rendered unnecessary by the enacting of the Malabar wills Act (Madras Act V of 1898.) It is a declaratory Act. It applies to persons domiciled in Madras and who are governed by the Marumakkathayam and Aliyasanthana Laws of inheritance.

1. (1888) I. L. R. 12 Mad. 126.

(Sec. 3) Every person of sound mind and not a minor i. e. aged 18 years (S. 2) may by will dispose of the property which he could legally alienate by gift *inter vivos* and is deemed to have been always competent to dispose of such property. S. 5 invalidates wills obtained by fraud, collusion or such importunity as takes away free agency. S. 6 provides for revocation. Ss. 8 *et seq.*, provide rules for execution, attestation, revocation, alteration and revival of wills [1]. S. 7 provides that nothing contained in S. 8 shall (a) affect any right established before the commencement of the Act by any court of comepetent jurisdiction or (b) authorise a testator to deprive any persons of the right of maintenance or (c) affect any law of intestate succession or authorise any testator to create in the property any interest which he could not have created before the Act. The exact significance of the last clause is not clear. Possibly it was thereby intended to prevent the application of ordinary rules of succession to cases to which the rule of survivorship or lapse had been previously applied. The right of maintenance referred to is apparently the right conferred by S. 17 of the Malabar Marriage Act. (Madras Act IV of 1896). The Nair Regulation S. 18 and Cochin Regulation S. 4 similarly confers power of testamentary disposition in Travancore and Cochin respectively. The latter requires writing while the former does not.

107. In *Kanaku Iswaran Kandan* v. *Sirkar*, [2] two classes of heirs are mentioned: one, descendants of great-great-grand-mother downwards of a deceased person between whom and himself community of property exist and who are called anandravans or *Seshakars*; secondly those who claim from more remote female ascendants and who are known as *Kuttukars* or *dayadies*. The property escheats to the Crown only on failure of both these classes of heirs but the Crown has a claim for *adiyara* fees

1. See *Kutti Haji* v. *Kunni Haji* (1919) I. L. R. 42 M. 761. oral will not valid.

2. (1882) 2 Tr. L. R. 38

in the case of the second class of heirs [1]. The classification, it will be noticed, is a clumsy adaptation of the Hindu Law rule as to Bandhus, with a graft from the rule as to co-parcenary ceasing with the great-grandson. In fact there seems to be no limit, either under the Hindu Law or the Marumakkathayom Law, within which alone co-parcenary can exist and the rule is obviously one for revenue purposes. In *Raman Govindan* v. *Raman Raman* [2], the doctrine of lapse as laid down by Holloway, J., in *Kallati Kunju Menon* v. *Palat Erracha Menon* [3] was accepted as sound law and it was further elaborated in *Lakshmi Narayani* v. *Eachooly Mathevi* [4] in its application to divided *Kootukars* or *dayadies*. It was laid down in that case, that the property of the last surviving member of a Tarwad would, on his or her death lapse jointly to the Tarwads having community of pollution or *pula sambandam*, the nearer excluding the more remote, nearness being however determined not by degrees of propinquity alone but also by the circumstance as to who divided off last. If the tarwad in which the succession vests is divided into Tavazhis or branches without community of rights, the branches might *inter se* enforce division of the property. *Raman Govindan* v. *Raman Raman* [2] was dissented from in *Panapilla Jankipilla Narayanipilla* v. *Kanaku Krishnan Narayanan* [5], as regards certain classes of property and was ultimately overruled in *Sakthi Kerulan* v. *Sakthi Sakthi* [6] where it was held that the self acquisitions of a member devolve on the tavazhi and not on the tarwad. "If propinquity is the test for heirship in Marumakkathayom law to a property left by a Marumakkathayom last survivor who had absolute power of disposal during his life time over

1. *Kunjan* v. *Ulahanman Ouseph* (1900) 17 Tr. L. R 117.
2. (1899) 15 Tr. L. R. 57.
3. (1864) 2 M. H. C. R. 162.
4. (1900) 17 Tr. L. R. 69.
5. (1906) 22 Tr. L. R. 278.
6. (1908) 24 Tr. L. R. 102.

that property" argue the majority consisting of Sadasiva Iyer, C. J. and Hunt, J., "the logical result is that the law of inheritance as to self-acquisitions should also be based on propinquity of relationship the only limitation imposed being that the legal person that inherits should be or represent a Tavazhi and not inherit as a mere individual." Even here it will be noticed we are under the spell of the doctrine of lapse though in a more qualified form. That there should be individual heirship at some stage could not be helped for instance when all the members of the Tavazhi are divided from each other. Even then the learned Judges would apparently first notionally transfer the property to the Tavazhi and then divide the properties between the various members. How that division is to take place, whether according to the Sub-Tavazhis it may consist of or according to the number of members, is in itself a problem to be determined according to the view one is inclined to take of the rights of individual members at a partition of the family property. How much of the theory enunciated in *Lakshminarayani* v. *Eachooty Mathevi* [1] survives *Sakthi Kerulan* v. *Sakthi Sakthi* [2] has not yet been the subject of any decision in Travancore. Under the Hindu Law, as between the descendants of a co-parcener, the status of non-division is a ground of preference. The right of the descendants by birth forms the basis of that preference under the Hindu Law. Group succession would seem to be a circumstance in favour of its recognition under the Malabar Law in all cases, but the rule of succession by the Tavazhi being a rule of succession and not a rule of survivorship in any form, preference of individual members of the Tavazhi on the ground of non-division would indeed be an anomaly. Preference on the ground of being the latest to be divided off, from the propositus is a fanciful elaboration for which there is no analogy whatever in the Hindu Law.

1. (1900) 17 Tr. L. R. 69. 2. (1908) 24 Tr. L. R. 102.

108. Under the Aliyasanthana Law of South Kanara the effect of the decisions is that property goes to the nearest Tavazhi [1] and it is assumed in *Timma* v. *Daramma* [2] that if the several divided tavazhis become entitled they take equally and as tenants in common. [3] In this matter the Malabar Law as administered at present is in an unsatisfactory condition. The doctrine of lapse laid down by Holloway, J. in spite of the destruction of its theoretical basis in *The Sivaganga Case* managed to survive in many an *obiter dictum* and was upheld by the Full Bench in *Govindan Nair* v. *Sankaran Nair*,[4] by a majority, by Sir Arnold White, C. J. on the ground of *stare decisis* and by Abdur Rahim, J. on the ground of custom. The authority of this decision is considerably shaken by the decision in the later Full Bench in *Krishnan Nair* v. *Damodaran Nair* [5] which vigorously combats the view and rejects it so far as succession to the property of females is concerned. As it is, in the case of males, the rule of lapse to the Tarwad obtains, but in the case of females, the rule of succession to the Tavazhi obtains. Even in the case of males, property acquired out of the savings of *Putravakasam* property or joint acquisitions of the members of the branch would be taken by the branch and not by the tarwad. [6] The effect of the later Full Bench decision is to restrict the application of the decision of the earlier Full Bench to cases in which there is a Tarwad undivided from the propositus and it renders inadmissible the elaboration of the doctrine of lapse contained in *Lakshminarayani* v. *Eachooty Mathevi*. [7] The point was

1 *Antamma* v. *Kaveri* (1884) I. L. R. 7 Mad. 575 ; *Manjappa Ajri* v. *Marudevi Hengsu* (1915) I. L. R 39 Mad. 12: 30 M. L. J. 204.

2. (1887) I. L. R. 10 Mad. 362.

3. See *Madhavi Amma* v. *Kunhunni Menon* (1893) 4 M. L. J. 43.

4. (1909) I. L. R. 32 Mad. 351: 19 M. L. J. 350.

5. (1912) I. L. R. 38 Mad. 48: 24 M. L. J. 240.

6. *Komu Nair* v. *Ittiatha Amma* (1899) 10 M. L. J. 57.

7. (1900) 17 Tr. L. R. 69.

raised in S. A. 1811 of 1905, but their Lordships did not express a final opinion though their inclination was against it. The actual decision was that when a family divides most of the properties belonging to it, it is divided in status and the properties so divided and subsequent acquisitions therewith go to the Tavazhi though in respect of the undivided property it may be, the whole tarwad continues joint in status. The best analogy to the doctrine of lapse afforded by the Hindu Law is the *usage of survivorship* obtaining in Zemindaris and in respect of them the latest decision of the Privy Council [1] is that when there is a division of status in the family, i. e., say in respect of all the partible property the usage of survivorshp in respect of the impartible estate ceases and the property thereafter descends like ordinary separate property and there cannot be any justification for appealing to the doctrine of lapse for the purpose of giving preference to the Tarwad, much less any particular section of the Tarwad as being the last to be divided off from the propositus. The decision of the Privy Council in *Sivagnana Thevar* v *Periasami* [2], is authority for excluding properties in respect of which there has been a division from the operation of the doctrine of lapse though there is a tarwad in existence joint and undivided in respect of the bulk of its properties. The rule of succession as distinguished from the rule of survivorship or lapse is that property descends to one's own descendants (which is possbile only in the case of females) in default to the mother's Tavazhi, in default, to the grand mother's Tavazhi and so forth. Where it should stop, it is difficult to say but it may be assumed as in the Travancore cases that the limits for purposes of pollution mark also the limits for purposes of inheritance though the right of inheritance may not depend on the right or duty to make funeral offerings.

1. *Tarakumari Chaudhury* v. *Chaturbhuj Narayan Singh* (1915) I. L. R. 42 Cal. 1179: 29 M. L. J. 371 (P. C.)

2. (1878) I. L. R. 1 Mad. 312,

109. Under the Travancore. Law, a convert would lose all rights of inheritance, but in British India he will have to be treated as a divided member and his rights determined on that basis. That is to say, in cases where the doctrine of lapse applies and even in other cases, if his Tavazhi is undivided from the deceased he may be cut off as any other divided member is. So far as the rights of succession to the property of the convert are concerned those would be determined by the law to which he is subject and if under that law mothers, brothers or sisters or the descendants of the mother or sister, though of another faith are entitled to take, the fact that legal marriage is not recognised among the Malayalees should not stand in the way of their inheriting the property. It may be too much however to expect those systems to recognise the descendants of the males when the law by which these are governed does not recognise heritable relationship. The ground is wholly untrodden and naturally one hase to speak with considerable reserve.

110. Again there are piebald systems of inheritance like that of Mappillas or Tiyas which, on account of the complications they persent, have to be dealt with separately.

111. Ss. 23 and 24 of the Malabar Marriage Act also introduce certain variations in the ordinary law of inheritance. S. 23 says :—Where a man following the Marumakkathayom or Aliyasanthana Law of inheritance dies intestate in respect of his self-acquired or separate property or any portion thereof, one half of such property or in the event of no member of his tarwad surviving him the whole of such property shall devolve on his widow if he leaves no children or on his children in equal shares if he leaves no widow or on his widow and children in equal shares if he leaves both widow and children. S. 24 lays down that where a woman following Marumakkathayom or Aliyasanthana Law of inheritance dies intestate in respect of separate or self-acquired property or any portion thereof one half of such property shall devolve in equal shares upon her children and in the event of no

member of her tarwad surviving her the whole of such property shall devolve on her husband. S. 2 defines children as sons and daughters of parents whose *sambandham* has been registered under the Act whether born before or after such registration. In the case of any one whose personal law permits adoption children includes adopted sons and daughters. These sections it will be noticed form a serious departure from the ordinary rules of inheritance. But as they have a restricted operation no question has yet arisen under these sections. The Travancore Nair Regulation S. 12, as well as the Cochin Regulation S. 15, provides for one half of his separate or self-acquired property going to the wife and children and the other half to his mother's Tavazhi, in default to the grandmother's Tavazhi and so forth. In default of undivided heirs, the whole goes to the wife and children.

112 It has been decided under the Aliyasanthana Law that leprosy and insanity which are recognised as grounds of exclusion under the Hindu Law cannot be regarded as such under that system [1]. As stated in *Sanku* v. *Puttamma* [2] "the test in such cases under the Hindu Law is whether the defect is such as would be sufficient to prevent the claimant from offering the proper funeral oblations. Right of succession under the Aliyasanthana Law is in no way dependent on the capacity to offer funeral oblations." There is no reason why the Malabar Law should in this matter differ from the Aliyasanthana Law.

1. *Chandu* v. *Subba* (1889) I. L. R. 13 Mad. 201; *Sanku* v. *Puttamma* (1890) I. L. R. 14 Mad. 289 at 299.
2. (1890) I. L. R. 14 Mad. 289.

CHAPTER XV.

MARRIAGE.

113. Marriage—an institution—Legal effect of 114 Forms—Rules of marriage as to caste &c. 115. Geographical prohibition 116 Age—Consanguinity, rules as to 117. South Kanara—Aliyasanthana 118. Residence of the wife 119 Polyandry 120. Malabar Marriage Act—Provisions of 121. Success of the Act 122. Travancore Legislation—Nair Regulation Provisions of 123. Cochin Legislation.

113 So far as decided cases go, Malabar Law does not recognise marriage as a legal institution and in spite of the pious hopes expressed by Mr. Moore in his book on Malabar Law, the prospect of its being recognised as such seems to be very remote. It is, indeed, very difficult for English Lawyers steeped in the notions and shibboleths of English Law to reconcile themselves to the idea that a sexual union, on which no rights of property or inheritance are founded, terminable at the will of either party, subject at best to certain conventional restraints among the more respectable classes such as a money payment and the control of the relations [1] could constitute a valid legal marriage. The decision in the contrary sense was arrived at in a case under the Aliyasanthana Law, [2] which cannot in truth be said to countenance in any degree the loose theory of sexual relations prevalent in Malabar. Kerala Mahatmya, an apocryphal work which purports to embody the rules laid down by Parasurama for the guidance of the country reclaimed by him from the sea, as Kerala is believed to be, has this among other rules:—"Among the folk of this land, in this my country among all castes, among all Samantas and among all other women likewise, let there be no chastity. But for the wives of the Brahmanas and Dwijas let the rule of chastity

1. *Koraga* v. *Queen* (1883) I. L. R. 6 M. 374; *Subbu Hedge* v. *Tongu* 4 M. H. C. R. 196.

2. *Koraga* v. *Queen* (8883) I. L. R. 6 M. 374.

stand. With other residents let there be no rule of chastity." Notwithstanding this rule, marriage is recognised as a social institution in Malabar and all evidence goes to show that the sexual relations there by no means compare unfavourably in point of fixity and purity with the sexual relations obtaining elsewhere in India. The idea that sexual relations are loose in Malabar is largely due to the fact that unions take place between Brahmins and certain other higher classes and Nair ladies under forms usually adopted for the marriage of people belonging to the same caste though in those cases the idea of legal marriage is necessarily excluded. As observed by Mr. Justice Muthuswami Iyer in his Marriage Commission Report the fact that even Brahmins to whom the forms could have no significance are made to go through them, speaks strongly for the binding force of the marital customs. It sometimes happens that the same castes are governed in different places by different laws ; for instance, the Tiyas are governed in North Malabar by the Marumakkathayom Law while in the south they are governed by the Makkathayom Law. There is no prohibition against marriage between them and the same forms are gone through at those marriages as at the marriages between purely Marumakkathayom couples. The issue inherit from their father as well as participate in the tarwad property of the mother. Among the Jains of Kanara some are governed by the Aliyasanthana Law while others are governed by the ordinary Hindu Law and marriage between them is not prohibited. The ordinary forms of marriage are gone through and the children inherit to both the parents. Some Nambudiri Brahmanas are governed by the Marumakkathayom Law but their women are married in the usual forms of Brahmin marriage and for all but purposes of inheritance the marriages are looked upon as of the same binding force as other Brahmin marriages. The Mappilas governed by the Marumakkathayom Law afford another illustration. Among the Aliyasanthana people, children participate in the

funeral ceremonies of their father; indeed, Bhutala Pandya's Kattukattalai, the somewhat discredited work which may however be valuable as a record of social usages says in one of its Kattalais "while the members of the family have to observe the birth pollution and take the property the children alone participate in the father's merit and demerit and observe pollution on his death." There is nothing really in the forms themselves that need prevent them from being regarded as a source of legal relationship.

114 *Sambandam* is the generic term applied in Malabar to marriage as understood by the Marumakkathayom communities. It has certain local varieties with slightly varying incidents. For instance, there are three different forms in North Malabar—*Podamuri, Vidaram Kairuga* and *Usham Porukka*. The peculiarity of *Podamuri* is that the bridegroom has to give a piece of cloth to the bride. This formality is not gone through in the other two forms but till *Podamuri* is performed, the bride is not taken to the husband's house. The term applied to the marriage of the Tiyas of North Malabar is *Mangalam*. A small amount is paid under this form to the karnavan of the bride as *bride kanam*, strongly reminiscent of the bride-price under the Hindu Law. "*Sambandham*" is the term in general use in South Malabar. "*Sambandham*" differs from *Podamuri* in that gift and acceptance of cloth forms no part of the ceremony. Inparts of South Malabar, betel-nuts are given instead of cloth. In *Kidakora* which is the form prevalent in Palghat Taluq, the formal permission of the senior lady of the Tarwad is taken for cohabitation with the bride for six months. None of these forms is observed in Kovilagoms. A ceremony called Veli, in some Kovilagoms it is called Kalyanam, is celebrated with great pomp and at considerable expense, but this corresponds only to Talikattu Kalyanam among the Nairs and bears no analogy to marriage Sambandam. It is ordinarily performed betore maturity and the ceremony consists in the Kovilagom Tamburan tying a piece of gold round the neck

of the bride. In the Kovilagoms of the Zamorin the tali tying is done by a Raja of Cranganore. If the Koil Tamburan is willing, he consorts with the lady; if not she consorts with a Nambudiri Brahmin without any further ceremony. She may put him away at pleasure and take another in his place with the consent of the senior Raja of the Kovilagom for the time being. In fact the higher you go, the looser the sexual relations seem to be. Corresponding to the Veli ceremony, the Nair and the Marumakkathayom Tiyas have their Talikattu ceremony. According to custom, every girl must go through this ceremony before she attains puberty; otherwise she is considered to lose her caste. Failure to perform the Talikattu ceremony is a gross breach of social etiquette and involves social degradation. In its essence (like the Veli ceremony) this also consists in the tying of a piece of gold called tali round the girl's neck. In North Malabar it is done by a low class Brahmin; in South Malabar by a young man belonging to the caste. As a religious ceremony it gives the girl a marriageable status and in North Malabar she is addressed thereafter as *Amma*. But in relation to marriage it has no other significance than that no girl can contract marriage without going through it. The tali may be removed after the 4 days' ceremony. It does not confer any right on the person tying the tali to claim the girl as his wife. Among the Marumakkathayom Tiyas a woman of barber caste used to tie the tali but now the practice has been substituted of the proposed husband's sister or even the husband himself tying the tali. A Nair female is not at liberty to marry a Nair of an inferior sub-division. a Nair male or No female can marry into an inferior caste. If a Nair woman takes a husband from an inferior sub-caste, she is excluded from social intercourse though not from the temple or the tank. This is known as the rule of Anuloma and Pratiloma. If a Nair female consorts with a Nair male of

equal or higher caste without any form of marriage and conceives she is not put out of caste provided he acknowledges the paternity of the child. This is used as an argument against *Sambandham* being recognised as a legal form in the Majority Report of the Malabar Marriage Commission. It is doubtful however if even in the East Coast, a woman would lose caste under similar circumstances ; the Shastras do not seem to contemplate loss of caste except among the first three classes under those circumstances.

115. In North Malabar, a woman crossing the river called Korapuzhai is supposed to forfeit her caste and the orthodox belief is that it is not competent for her to marry in South Malabar which lies to the south of the river but the men of North Malabar are not under such disability. This custom is common both to Nairs and Tiyas. The custom is being slowly departed from. It seems to be more a geographical prejudice than a recognised impediment to marriage.

116. As regards marriageable age, there are no customary restrictions; marriage before puberty is permitted though it is neither obligatory nor common. A remarriage is not forbidden by custom on the death of the husband. With reference to prohibited degrees of relationship the rule founded on consanguinity is that persons descended from a common female ancestor are not at liberty to marry one another; with reference to forbidden affinity, the rule of prohibition is considered to be the same, the members of the Tarwad of the deceased wife and husband being ineligible. In South Malabar there is a difference of opinion; some confine the prohibition to such relations by affinity as stand in the relationship of parent or child. None of these marriages seem to have any connection with religious observances.

117. As in Malabar, there is a social and customary marriage in South Canara also though there is nothing corresponding to Talikattu Kalyanam. There is no restriction as to mar-

riageable age or on polygamy. There is no objection corresponding to Korapuzhai objection nor is there the doctrine of Anuloma and Pratiloma. On divorce it is customary to refund *Tirodacce* or payment made by the husband at the time of marriage which varies from 2 to 5 Pons. i.e. 8 to 20 Rs. There is one curious rule as regards re-marriage of widows. It is only a widower that is permitted to marry a widow and there is a special form for such marriages. In the ordinary forms of marriage, there is the practice of *Dhare* or joining of hands with a gindi or vessel of water upon them placed by the parents and karnavans of the couple. Among the Billawas and some families of Bants also in the Coondapore and Udipi Taluks the practice of even pouring water seems to prevail. The common belief however, is that water ought not to be poured as there is no change of family or gotra by the marriage. Unlike among the Marumakkathayom people, the children of a deceased man take part in the funeral ceremonies ; in fact according to the Aliyasanthana Kattukattalai they alone have pollution. Widows cannot take part in auspicious ceremonies even after marriage. People belonging to the same *bali* (corresponding to gotra among Brahmins) cannot marry. Not all *bâlis* can intermarry but only certain of them. A person can marry his mother's brother's daughter and her descendants or his father's sister's daughter and her descendants, but he cannot marry his father's brother's daughters or their descendants.

118. In North Malabar and South Canara, the practice is for the wives to live with their husbands in the latter's tarwad home and it is considered the duty of the karnavan to provide for their maintenance. The right of the anandravan to have the cost of maintaining his wife included in his allowance for maintenance was recognised in *Parvathi* v. *Kamaran.* [1] It is believed that the same rule will be applied in South Canara. In South Malabar the practice seems to be for

1, (1883) I. L, R. 6 Mad. 341,

ladies to live in their own tarwads and receive visits from their husbands. The former practice seems to be gaining ground even in South Malabar. Accordingly in recent cases the right of the women governed by both the systems to claim maintenance from their tarwad during their stay with their husbands has been recognised.

119. Polyandry appears to have existed among certain classes of Nairs but seems to be fast dying out. But it is not peculiar to Marumakkathayem people for the practice obtains though rarely among the Makkathayom carpenters in South Malabar.

120. The first attempt at legislation was made in the Malabar Marriage Act of 1896. (Madras Act IV of 1896) It is applicable to Hindu, following the Marumakkathayom and Aliyasanthana Laws of Inheritance. Under this Act, a *Sambandam* between Hindus both or either of whom follow the Marumakkathayom or Aliyasanthana law of inheritance may be registered. Sambandam denotes an alliance between a man and a woman by reason of which they in accordance with the custom of the community to which they belong or either of them belongs, co-habit or intend to co-habit as husband and wife. Registration is subject to the following conditions :— (i) Neither party must be subject to a personal law according to which he or she cannot validly contract a marriage. (This excludes possibility of marriage betwen Brahmins and Nayars,) (ii) The customary rules of consanguinity and affinity are to be observed. (iii) Neither party should have a husband or wife living whose Sambandam has been duly registered and is valid. (iv) The parties must not belong to communities between whom marriage is by custom prohibited. (v) The customary ceremonies must be observed. (vi) If a party is a minor the legal guardian's consent must be obtained. The Act provides for notice of the registration to be given to the other party to the marriage, to the guardians and the managing members of the tarwads or families of the couple. It is open to the

persons entitled to notice to object to registration on the ground that it contravenes any of the conditions laid down above. The right to object is given not only to these persons but also to any member of the tarwad of either of the parties, even to an attaladakam relation. In the event of an objection being duly taken registration is to be postponed for 4 months within which time the objector may file a suit for a declaration that the marriage cannot be registered and produce a copy of the plaint and the registration will be postponed pending the decision of the suit. A marriage once registered shall be invalid only on one of the following grounds :—(i) Incapacity under the personal law to validly contract a marriage with the other party. (ii) Relationship through a common ancestor who stands to each of them in a nearer relationship than great-great-grandfather or great-great-grandmother, which the custom regards as a bar to marriage. (iii) Either party having a wife or husband living whose marriage is registered under the Act and is valid and in force. If notice is not served on any person entitled thereto, it shall be competent for him to sue for cancellation of marriage on all the grounds available before registration, within 3 months of the registration. On the application of either party the court may declare the marriage to be dissolved. If the dissolution is without the consent of the wife, she is entitled to maintenance so long as she remains a Hindu and is in caste and does not contract another Sambandam and provided also she was not guilty of adultery before dissolution (uncondoned). Both the wife and the issue of the marriage are entitled to maintenance from the husband. The defences to such claim are said to be the same as are open under the Hindu Law. The husband is the guardian of a wife after her 14th year and the father, of the minor children. The guardianship does not extend to the Tarwad property. Rights of inheritance are conferred on the widow and the children to the extent of half of the self-acquired or separate

property of a deceased intestate, if there are members of the tarwad living ; if there are not, to the whole. The property is to be divided equally between the wife and children. Similarly half of the wife's property devolves on her children in equal shares and in the event of no member of the tarwad surviving, the whole of such property devolves on the husband. The rule as to succession to a woman's property are less liberal to the children than the rule eventually declared by the Full Bench to be the rule applicable to them ; not to say that it ignores the grand children and other descendants altogether.

121. The Act has not been popular. Very few marriages have been registered under it. The real impediment to the success of the Act is that the advantages of registration are too few to compensate for the trouble and courage involved in registering the marriage. It retains the old forms and as such from the point of view of sentiment, the new marriage does not appeal more strongly than the old. The assumption of the Act that the customary marriages are not real marriages and the idea that a registration before an officer to whichsoever creed or nationality he might belong would constitute the marriage a legal marriage has naturally arrayed all conservative forces and prejudices against it. The Act, it will be noticed, is only permissive.

122. The Travancore Government has been bolder. It has passed a Regulation called Nair Regulation (Travancore Nair Regulation I of 1088, which declares that the conjugal union of a Nair female subject to the restriction of consanguinity and affinity with a Nair male or any male other than a Nair with whom a conjugal union is permitted according to recognised social custom and usage openly solemnised by the presentation of cloth to the female by the male, whether so solemnised before the date on which the Regulation comes into force and subsisting on such date or so solemnised after the Regulation, shall be deemed to be a

valid marriage for all legal purposes. In conjugal unions entered into after the Act, if the male is below 18 and the female below 16, the consent of the legal guardian is to be taken for the marriage. Such marriage is dissolved only in one of the following ways :—(i) by death of either party ; (ii) by mutual consent evidenced by a registered document; (iii) by a formal order of dissolution which can be had on application to court, provided that if the husband is the applicant he has to offer compensation except when the respondent has renounced Hinduism. The court may award compensation not exceeding 2000 Rs. Subsequent marriage of a female during the continuance of a prior marriage is void. The wife and minor children are declared entitled to maintenance provided the wife does not live in adultery or has not renounced Hinduism. In the case of a non—Nair father, the widow and minor children are entitled to be maintained out of his self-acquisition or separate property provided that the widow shall not be entitled to maintenance if she marries again, leads an unchaste life or has renounced Hinduism. The husband is the legal guardian of the wife and the father, of the minor children if they are maintained by him and live with him or are under his protection. On the death of a Nair male, his wife and children get the whole of his self acquired or separate property if he has no Marumakkathayom heir ; if he has, the two classes of heirs take each a half. The feature of this legislation is that it proceeds on the lines of least resistance. It recognises *sambandams* with non-Nairs but in that case there is no right of inheritance at all Polygamous unions are permitted. No registration is required for the marriage. The rule as to succession is defective in that it does not provide for grand-children, but the clause being, even as it is, a measure of substantial relief is likely to be welcomed.

123. Cochin Regulation XIII of 1095 goes a step further by prohibiting polygamy and giving rights of inheritance

to the separate property of the non-Nair father. Under it, none having a personal law of his own allowing polygamy shall marry a Nair female while already married to a caste wife or marry a caste wife while having a Nair wife already. Half the self-acquisition of a non-Nair father goes to his undivided heirs and half to the Nair widow and children and if there is no Tarwad, the whole goes to the latter.

CHAPTER XVI.

THE NAMBUDIRIS.

124. Nambudiris—Points of similarity between, and other Brahmins. 125. Social observances and legal customs to be distinguished—Juniors' Right to marry. 126. Impartibility—Source of rule 127. Date of settlement. 128. Marumakkathayom rules Hindu Law to be applied. 129 Womens' rights. 130. Women's rights further considered-ancient Hindu Law—Travancore view. 131. Power of disposition of last surviving female 132 Consent of women to Sarwaswadanom marriage. 133. Order of seniority among women—Test—Standing in Illom. 134. Pious obligation of son. 135. Rights and obligations of members—Marumakkathayem rule. 136. Points of difference between ordinary Hindu law and Nambudiri usage. 137. Marrying and Raising issue for the illom.

124. The Nambudiris are what may be called the indigenous Brahmins of Malabar. They settled in the country several centuries ago and became the sons of the soil. They acknowledge the authority of the Vedas and Smritis like the other Brahmins and have faith in the religious efficacy of ceremonial observances and of funerals and annual obsequies. Unlike the Nairs, among them succession is traced through males, property passing from father to son and so on, and legal marriage forms the basis of succession. In respect of their marriages they are governed by the Sastras as the other Brahmins. The Nambudiri woman on her marriage takes her husband's gotram and passes into his family from that of her father. Perpetual widowhood and incapacity to remarry on the husband's death are equally with the other Brahmins incidents of the marriage of Nambudiris. The same rule of collateral succession obtains among them as among other Brahmins. They classify Dayadis into those that have ten days' pollution and those that have three days' pollution, Sapinda and Samanodaka relationship being the cause of such pollution. The ceremony of investiture and notion of second birth is common to both. Their gotrams are the same as those of Brahmins elsewhere. There is no doubt that the

principles of law laid down in the Dharma sastras governed them when they migrated to Malabar. [1]

125. But they have perhaps changed more after their migration than the Aryans did in most other parts of India, so much so indeed that Brahmins in other parts of the country do not recognise their kinship with the Nambudiris without considerable argument. They have become a part of the peculiar social system of Malabar, and are more intimately connected with the lower castes, than are the Brahmins in any other part of India. Amongst them, as amongst the Nairs of Malabar, the family property is indivisible, except with the consent of all the members thereof. Usually, only the eldest of a number of brothers marries, and amongst the sons of the eldest brother again, only the eldest marries and so on. The other members consort with women of the Sudra caste; the children of such women have no rights against them or against the property of their family; nor indeed apart from legislation any legal rights whatever such as children have against their fathers elsewhere. There are many points of difference between the religious and the social observances of Nambudiris and the Brahmins of the other parts which are characterised as the sixty-four *Anacharams* or irregular practices of Malabar. Most of them relate to cooking, eating and pollution and the rest. It is curious that the most remarkable difference between the Nambudiris and the Brahmins elsewnere, viz., the absence of compulsory infant marriage is not stated to be one of the *Anacharams* which shows that marriage before puberty is considered permissible among them. In fact, there are instances though rare of infant marriage. As a rule however, women are married only after puberty ; and even after puberty they remain unmarried for a long time and some even for life, owing to the difficulty of procuring husbands consequent upon only the eldest member marrying

1. *Vasudevan* v. *Secretary of State* (1887) I. L. R. 11 M. 157.

among males. The result is that many women continue to be attached to the family of their birth till their death [1]. It is of the greatest importance to distinguish the social observances of Nambudiris some of which are no doubt very peculiar, from legal customs which affect their civil rights and which are binding upon them in courts of law. A very serious blunder was committed by the Courts of Malabar in consequence of the failure to keep this distinction in view. A Sub-Judge, a native of the District and a Nair, held [2] that the marriage of a junior member of a Nambudiri Illom was invalid in law as being opposed to the long-standing custom of the caste and that his wife acquired no legal rights under it. Mr. Wigram also committed the same mistake [3], but that need not surprise one as much. It is absolutely wrong to suppose that any Nambudiri, whatever his position in the family, is incapable of contracting a legal marriage. As a Brahmin he has the right to marry and according to his sacred Sastras he ought not to consort with any woman without marrying her. The injunction of the Sastras is relaxed in Malabar from economic considerations in order to keep down the growth of the family. But the practice of the junior members not marrying is nothing more than the result of a social understanding. As a matter of fact, even socially a junior member who marries would not be regarded as doing anything wrong but only as causing a pecuniary injury to the family. Where the senior fails to have children, the next senior member marries and even this justification is not required where the family is very rich and the number of members small. If a junior member of a Nambudiri family marries and has children by the marriage it would shock the Nambudiris

1. *For a list of these* Anacharams *see Thurston's Castes and Tribes of Southern India, Vol.* 5, *p.* 185.

2. O. S. 35 of 1873, Sub-Court, Calicut.

3. A. S. 562 of 1876. District Court, Calicut.

to be told that the marriage connection is invalid in law, that the children are illegitimate and that the wife and children have not the same rights in the family property as they would have had if he was the senior member. In *Pappi Antarjanam* v. *Teyyan Nair* [1], the point directly arose and it was held that junior members were entitled to marry. The Subordinate judge in that case observed that he had not been referred to a single decision of the High Court wherein the marriage of an anandravan in a Nambudiri family had been held to be valid and when it was pointed out that evidence had been adduced before the District Munsiff of several cases in which junior male members had contracted marriages, he brushed it aside as follows, "I am of opinion that the law should be administered as it is and not according to the practice amongst the Nambudiris which must have been of recent origin. Be that as it may, there is no legislative or judicial sanction for the marriage of a junior member of a Nambudiri family" "The sub judge has here" their Lordships (Subrahmania Aiyar and Moore, JJ.) rightly observed in second appeal "improperly imposed on the plaintiff the onus of proving that the marriage of a junior member is legal. Brahmins are to be found all over India and everywhere they are in the habit of contracting valid marriages with females of their own caste. Even in Malabar it has never been questioned that the senior males at all events in an illom can marry. Such being the case the onus of proving that certain members of certain Brahmin families cannot enter into a legal marriage is clearly on the person who advances such a proposition, opposed as it is to the law and custom prevailing among the members of the caste all over India. The defendants have certainly not discharged the onus ; all that they have shown is that in order to maintain the rule of impartibility prevailing among Nambudiris, a custom is observed under which junior members do not usually marry but the evidence proves that the custom

1. (1903) 14 M. L. J. 214.

both males and females, were under the protection of the patriarch who had absolute control over the property. It is hardly likely that individual members were recognised as having any right except to be maintained at the expense of the joint family property, and in this respect, both males and females were alike. The law of non-partition was therefore carried by the Nambudiris to Malabar as part of the law which governed them in their own country, and it is unphilosophical to suppose that they borrowed that law from the Marumakkathayom inhabitants of Malabar. The Marumakkathayom law is the old Hindu law, in the same manner as the Nambudiri law is, but there is no justification for assuming that the Nambudiris are indebted to the Marumakkathayom law for the principle of non-partition which governs them.

128. A question which has frequently arisen is whether the principles of Marumakkathayom law or of the ordinary Hindu law are to be applied in disputed cases to the Nambudiris. It has sometimes been loosely said that the ordinary Hindu law should be applied unless any custom is proved to displace it in any particular respect [1]. In *T. Savithri Andarjanam* v. *M. Vasudevan Numbudripad* it was assumed that the ordinary Hindu law according to which a widow is incompetent to alienate property inherited from her husband in the absence of adequate necessity justifying the alienation, applies also to the Nambudiris. [3] In these cases the principles of Mitakshara law as it now obtains in the Madras Presidency have been generally held applicable to Nambudiris and the onus has been laid on the party asserting that that law is not applicable to them of proving any custom to the contrary. This is proceeding on an altogether erroneous basis. It may be that if it is contended that any fundamental

1, *Amayur* alias *Aguithrathan* v, *Itticheri* (1889) I M L. J. 303.

2. (1881) I. L. R. 3 Mad. 215.

3. *See also Vishnu* v. *Krishna* (1883) I. L R. 7 Mad. 3 ; S. A. 495 of 1900 ; S. A 1821 of 1897 ; *Parameswaran Potti* v, *Matthen* (1888) 6 Tr. L. R, 143.

principle of Hindu Law such as it was in ancient times before the Nambudiris went into their new homes is inapplicable to them it would be right to hold that the onus lies on the party asserting that a principle which is applicable to all Hindus from the earliest times is not applicable to the Nambudiris. But it would not be right to apply the same rule when it is sought to apply the rules of Hindu law which are not so ancient but are the result of modern developments of that law. In such cases the court has to decide whether there was any definite rule of Hindu law applicable at the time of Nambudiri migration into Malabar, and whether that rule has been subsequently adhered to. The question in such cases is not whether any usage that is pleaded satisfies the tests of a custom displacing the written law, but whether evidence let in is such as to show that the usage pleaded has been observed as law. That is, the court has to find out what is the law by the evidence let in as to usage and not to decide whether there is such proof of usage as to show that it has displaced any rule of law to the contrary. This was the view acted on in *Rarichan* v. *Perachi*. [1] In *Vishnu Nambudiri* v. *Akkamma* [2] discussing the rule of law applicable to the self-acquisition of a Nambudiri, Mr. Justice Krishnaswamy Iyer says, "The Nambudiri is governed by the Smritis. Except in so far as recognised custom has made any inroad into the law of the Smritis, he is governed by that law." Note the distinction between the law of the Smritis and the law as laid down by the commentators though as Mr. Justice Sankaran Nair remarks in that very case the law of the Smritis is "generally speaking the law laid down by the author of the Mitakshara."

129. One question that has often arisen in which the correct principle to be applied would be of great importance

1. (1892) I. L. R. 15 Mad. 281 : *see also Sri Braja Kishora Deva Garu* v. *Sri Kundana Devi Patla Mahadevi Garu* (1899) I. L. R. 22 Mad. 431 : 9 M. L. J. 157. (P.C.).

2. (1910) I. R. 34 Mad. 496 : 20 M. L. J. 938.

is whether the female members of a Nambudiri family have ownership in the property in the same manner as its male members have. Suppose for instance a gift is made of a portion of the family property ; is it invalid in the absence of the consent of its female members as it will be if the male members do not consent to it ? If the rule of the ordinary Hindu law be applied, the consent of the female members will be unnecessary, for according to it, the ownership vests only in the male members, and the female members have only the right to maintenance, and will be entitled to object to an alienation only if it affects their right of maintenance, and not otherwise. But would it be right to apply the same rule to Nambudiri families ? As already pointed out in the patriarchal state of the law males and females were in much the same position; the right of all except the patriarch was only to maintenance. When he died, no doubt, another male member would succeed to his position, and a female might be disqualified for that office. That is, males would have a superior right to manage the family estate, and only in the absence of males would females be entitled to manage. But this is only the recognition of a superior capacity in the male to manage and does not show any superior ownership in him. Individual rights of alienation being unknown and a right to partition not having come into existence, the only tangible right of the junior members, barring the right to succeed to the management in their own turn, was the right to maintenance, just as it is in the present day in the Marumakkathayom tarwad of Malabar. It is undisputed that in the Marumakkathayom Tarwad the female members are as much proprietors of the family property as the males. Nay, as pointed out before, it used to be said that the proprietorship vests in the female members only, and that the males have no ownership.

130. Speaking of Marumakkathayom people, T. L. Strange in his Manual of Hindu Law says, [1] " in theory the property

1. Page 100.

is held to vest in the females only, the males having the right of management and claim to support. Practically the males are co-heirs with the females. In default of males, females succeed to the management of the family property." It evidently did not occur to the learned author how the males could claim a right to manage the property in which they have no right of ownership. He was evidently confusing the principle of succession to the property of the tarwad with the principle of ownership in the property. Succession is traced only through females, but that is no argument that the male members have no rights of ownership in the family estate. Both are in the same position in that respect and the position was exactly the same under the ancient Hindu law. Manu says [1], "Three persons, a wife, a slave and a son, have no property. Whatever they acquire belongs to him under whose dominion they are." Narada says " Women, sons, slaves and attendants are dependent." [2] Gradually no doubt the ideas of individual property developed while the position of women became distinctly inferior for a time, and she was not allowed the benefit of the change by which individual ownership was recognised in all the males of the family. The males became entitled to demand partition as a matter of right of all ancestral property. The female members were not allowed the same rights. The theoretical ownership is however recognised by the Hindu Law which in most circumstances, only inchoate and subordinate, becomes in others full and effective. When a partition takes place between the father and the sons, the father may reserve a share for each of his wives. When brothers divide after the death of the father a share is to be assigned to the mother and a fourth share to each of the unmarried sisters. But these women cannot claim a partition themselves but have to wait for the males effecting a

1. Chapter VIII, 416.
2. Narada Part I, Ch, V Sloka 36.

division between themselves to enforce their right to a share. In Madras the mother's right to a share is not recognised, and she is entitled only to an allotment for maintenance. The wives of deceased co-parceners are entitled to allotments for maintenance and the sisters are entitled to maintenance until their marriage and marriage portions. Where all the males die the widow of the last coparcener occupies the lucky position of an heir succeeding to the whole property, while the widows of the coparceners who died previously are only entitled to maintenance at her hands. It is doubtful whether this position is warranted even by the principles of the Mitakshara or any other modern commentary of weight. See the Judgment of the majority of the Travancore High Court in *Ramal Koopoo Ammal* v. *Ammani Rukmani Ammal* [1] who agree with the view held on the same question, by the Chief Court of Baroda in *Bai Ugam* v. *Bai Rukmani*. According to the Hindu law as it stood before the Nambudiris went to Malabar all the members of the family, both males and females were equally interested in the family property and the rule of non-partition having continued to be the law amongst the Nambudiris the female members of a Nambudiri Tarwad are equally entitled with the male members to the property of the tarwad. The question becomes important in two classes of cases: (1) where an alienation is impeached as not binding on the family, and (2) in the case of right to succeed to management where there are no adult males competent to manage. The Madras and the Travancore High Courts hold different views on the first question. The Travancore High Court held in an early case, *Parameswaran Potti* v. *Matthen* [2] following the ordinary Hindu Law, that the wife of a Nambudiri is not entitled to call in question an alienation made by him where her right to maintenance is not jeopardized, and that she is not entitled as a co-owner of

1. (1887) 5 Tr. L. R. 45 (F. B.)
2. (1888) 6 Tr. L. R. 143.

the property to set aside an alienation on the ground that it is prejudicial to the tarwad. But this view has since been overruled by the Full Bench of that Court in *Devaki Antarjanom* v *Sambhu*. [1] It was a suit brought by the widow of a deceased member to set aside an alienation by the manager. The Full Bench in holding that the suit was maintainable observed, "It is contended on behalf of the appellant on the analogy of the rule of Hindu law that it is only when her right to maintenance is affected that a female can question the alienation by a male member. But the Nambudiri ladies possess greater rights than a right to maintenance, and if the property of a Nambudiri Illom is impartible and is intended to be enjoyed by the members of the illom both male and female from generation to generation, the only way of preserving the property from needless waste is by empowering all the members interested to see that the property is not wasted or alienated by the manager for the time being." The court goes on to observe that the local custom also was in favour of recognition of equal proprietary right in male and female members. In *Savithri Amma* v. *Neelakantan Potti* [2] it was further held that a wife was in the same position and could sue to set aside an alienation made by her husband and could even sue to remove him from management. In *Vasudevan Krishnan* v. *Lakshmi* [3] the Travancore Court went even further and held that the last surviving female member of an illom had unrestricted powers of alienation at the same time though there is no express decision to that effect. The trend of the observations in *Savithri Amma* v. *Neelakantan Potti* [2] is to the effect that in making alienations the manager need not consult the female members.

131. As regards power of disposition of the last surviving female *Vasudevan* v. *The Secretary of State for India* [4] seems

1. 12 Tr. L. R. 46.
2. (1912) 27 Tr. L. R. 29 (F. B.)
3. (1911) 26 Tr. L. R. 212.
4. (1887) I. L. R. 11 Mad. 157.

to be clearly against it. But as regards the further question, whether they are not members of the Tarwad possessing a proprietary interest there are only unreported cases, that seem to lay down the contrary. In S. A. 1821 of 1897, it was held that the widows had failed to make out a custom that they were entitled to higher rights than under the ordinary Hindu law.

132. Again in another unreported case a question arose between the widow of the last male member of a Nambudiri illom and the widow of an earlier deceased member, whether the former was entitled to give her daughter in the Sarvaswadanam form thus making the issue of the daughter a member of the illom without the consent of the widow of the earlier deceased co-parcener. The court held [1] that in the absence of proof of a custom to the contrary, the whole property of the tarwad vested in the widow of the last co-parcener and that, therefore, the consent of the widow of the previously deceased co-parcener to the marriage was unnecessary. This proposition was rested on the decision of the Court in *Vasudevan* v. *The Secretary of State for India* [2]. That case is no authority for that proposition. That case can be said if at all, to be authority only for the position that the female members do not possess absolute powers of disposition. For it is pointed out therein that the Hindu law applicable to the Nambudiris is the law as it stood before their migration to Malabar. The Mitakshara had not been written then, and the rules of the Mitakshara have no operation as against them. The court said, "But it must be remembered that the personal law which they carried with them was the Hindu law as received by the Brahmins at the time of their settlement in Malabar and that it is not the law as modified by customs which have since come into prevalence among the Brahmins on the East Coast," and

1. S. A. 755 and 769 of 1892.
2. (1887) I. L. R. 11 Mad. 157.

as already pointed out it is by no means clear that according to the archaic Hindu law which prevailed before the colonization of Malabar by the Nambudiris the women of the family had less rights than the males excepting the patriarch.

133. It must be admitted, however, that if women are recognised to have equal rights in the tarwad property with men, questions may arise as to precedence with respect to rights of management which it may not be easy to solve. In a Nambudiri family owing to the absence of compulsory infant marriage and owing to marriage being really optional, the females of the family would or might consist partly of women born in the family who have not been married away and partly of women who have come into the family by marriage. The former class must be regarded as having equal rights with the latter, though these rights might cease on marriage. Again a woman coming into the family by marriage may be older than another woman that was married into the family earlier. A widow of the father may be younger than the widow of the son: (It should be remembered that Nambudiris sometimes go on marrying late in life). Suppose there are no adult males in a Nambudiri family how are we to determine which of the ladies are entitled to succeed to the management. In a Nair family no such difficulty arises. All the women are born in the tarwad and seniority in age is the only test. But how is the question to be determined in a Nambudiri family? The ground that one widow was married to the father while the other was married to the son may be put out of consideration. The superior social or religious position of the father's widow would not be any ground for recognising any preferential right in her to the management of the family property. It is not a ground for preference in Nair families. Thus a woman's mother's sister may be younger than herself, but it

does not give her any title to be preferred to her niece to the management of the tarwad property, as it does no amongst the males either. And amongst the Nambudiris too as between males there is not the slightest doubt that seniority is the only test of the right to management. But it is more difficult to decide whether seniority of age would give a right to management where another woman has been brought into the illom earlier. The point is bare of all authority. But it is submitted that the woman that is first married into the house must be held to have superior rights. According to ordinary Hindu law in the case of impartible estates, seniority in point of marriage gives a preferential right amongst widows. It would moreover be very unreasonable to hold that an old woman (for women may be married late among Nambudiris) who has just become a member of the house should displace younger women who have been long members of the illom. The latter are senior *in the illom*. The same principle is applied in determining cases of seniority as between ascetics of the same mutt in Malabar as elsewhere; the most senior disciple and not the eldest disciple succeeds to the headship of the mutt and its properties. The genius of the Hindu Law as it prevails both in Malabar and elsewhere is certainly in favour of holding that as between widows of the family, seniority of membership in the family should determine all questions of precedence as to rights of management. A similar principle should be applied as between women born in the house and women brought into it by marriage. The question would be who is the earlier member of the illom. If the woman born in the illom was born prior to marriage of the woman who became a member of the illom by marriage she would be entitled to succeed to the right of management in preference to the later accession to the illom. There is no other principle that could be applied to such cases. But in the absence of precedents, one cannot suggest these rules with confidence.

134. In *Nilakandan* v. *Madhavan* [1] Brandt and Parker, JJ. held that the rule of Hindu Law, according to which the son is bound to pay the debts of the father, is not applicable to Nambudiris. The judgment however is based entirely on the finding of the Subordinate Judge of Calicut that the rule in question was not applicable. No objection was raised to the finding and the High Court accepted the finding. It may however be doubted, whether the point really arose in the case. A decree for the specific performance of a contract was passed against a Nambudiri. He died after the decree and the execution of the decree was resisted by his widow and his two minor sons, the widow acting as their guardian. The decree-holder's petition to remove the obstruction was registered as a suit. The Munsiff found that the debt was binding on the sons, having been incurred for the benefit of the family, but instead of passing a decree for possession gave a decree for the debt for the discharge of which the agreement to sell was entered into and in default for the sale of the house. The Appellate Court reversed the decree on the ground that the debt was binding on the defendants unless they were able to prove that it was illegal or immoral. The High Court called for a finding on the question whether the law applicable was the ordinary Hindu Law or the Marumakkathayam Law or a combination of both, and if the last, in what respect the law as affecting the liability of the defendant differed from the ordinary Hindu Law. The Sub-Judge found that it had not been proved that the law compelling the son to discharge all debts of the father which are not illegal or immoral was binding on the Nambudiris. Now the question raised would not decide the liability of the widow who was one of the defendants in the suit. The High Court itself did not decide as a matter of law or usage that the rules in question did not apply to the Nambudiris. It

1. (1886) I. L. R. 10 Mad. 9.

is no doubt true that where the family consisted both of sons and of other members the rule of the son's liability to pay the father's debt would be absolutely inapplicable. The sons not being entitled to partition have no saleable interest in the property and the other members not being bound to pay the debt according to the rule in question, the whole of the properties is unavailable for the debt in question. But the question might be different where the family consists only of the father and the sons and their issue. This case cannot be taken as finally deciding the point in such a case at any rate. But the view taken in this case has since been followed in *Kunhu Kutti Ammah* v. *Kesavan Nambudiri* [1]. But this last case proceeds on the view that in this matter, the Hindu law must be taken to be qualified by Marumakkathayom usage which as has been shown is highly debatable.

135. The rules that have been discussed earlier as to the rights and obligations of the members of a Marumakkathayom Tarwad are generally applicable to a Nambudiri Illom also, with the important difference already pointed out. In fact some of the leading cases would be found to be cases of Nambudiri Illoms. The essential difference between the ordinary Hindu family and a Marumakkathayom family, so far as the rights of the members of the family *inter se* are concerned, is that the members of a Marumakkathayom family have no right to demand partition of the family property and all other differences are in reality the result of this essential difference. The Nambudiri family and the Marumakkathayom family being similar in this respect it follows that similar rules are applicable to both as regards the necessity for consent of junior members to alienation. The Travancore High Court makes a distinction in that unlike the karnavan in a Nair Tarwad, the manager of an illom, need not consult the junior members before effecting mortgages for a fixed period.

1. (1913) I. L. R. 38 Mad, 527.

136. The following further points of difference between the ordinary Hindu Law and the law of the Nambudiris are noted in *Vasudevan* v. *Secretary of State for India* [1]. The self-acquired property of the members of the illom lapse to the illom and not to the heirs of the deceased as under the ordinary Hindu Law. (ii) The institution of Sarwaswadanam marriage. (iii) The adoption of a son as the son of two fathers or in the Dwayamushyayana form is recognised among them. (iv) The widow can adopt in the absence of express prohibition. (v) The widow cannot adopt in the ordinary Dattaka form. Adoption in the Dattaka form can take place only when the adoptive father is alive. (vi) Though the evidence taken as to usage failed to support the position that the sole surviving widow had power to alienate inherited property at pleasure, their Lordships held that the evidence proved two other powers (i) the power to appoint an heir to perpetuate the illom which is otherwise likely to become extinct, (ii) the power to direct a Nambudiri to marry specially for her illom under an agreement that the son if born should be heir to her illom. As to the former it consists in adopting a person (who may be an adult or a married man) unaccompanied by any ceremony by simply giving a writing to him or sending written information to the Raja. So far as succession to self-acquired property is concerned *Vishnu Nambudiri* v. *Akkamma* [2] takes the view that it passes to the heirs of the deceased under the Hindu law and not to the illom. This is in accordance with the earliest of ideas as regards succession to self-acquired property among Marumakkathayis themselves. There is no Smrithi that does not recognise the son's right of inheritance to the property belonging to the father. If the property did not belong to the father though he acquired it—that was a stage in the growth of the Hindu Law—of course then there was no question of inheritance at all but when once that stage was passed and individual property came to be recognised, the

1. (1887) I. L. R. 11 Mad. 157. 2. (1910) I. L. R. 34 Mad. 496.

right of the son and the rest followed as a matter of course. Sarvaswadanam marriage is referable to the ancient Hindu Law which authorised the appointment of a daughter or her male child as the legitimate son of her father for purposes of funeral obsequies and of inheritance. The formula used in that form of marriage is a text of Vasishta which is as follows :— "I give unto thee this virgin (who has no brother) decked with ornaments and the son who shall be born of her shall be my son." It is the special agreement between the bride's father and her husband that distinguishes Sarvaswadanam from the ordinary marriage. So long as there is the prospect of a son being born she and through her, her husband hold the property in the event of her parent's death in trust for the heir in expectation and if she becomes a widow and the prospect of a male child fails, her legal position is that of a daughter who is retained in the father's family for the purpose of raising up an heir to it instead of, as is ordinarily the case, being transferred to her husband's family. [1] The mother may give in Sarvaswadanam marriage [2] but not a brother [3]. The man that marries in Sarvaswadanam form may be appointed an heir [4]. If he is not so appointed, he takes no interest and the property reverts on failure of issue to the heirs of the last owner [5]. The son of a Sarvaswadanam marriage does not inherit in the family of his father so long as there are other heirs in the family. He inherits only in the case of the extinction of those heirs and then only as attadadakam heir. When the Illom is extinct he inherits [6]. Having regard to subsequent authority this statement of the law should be confined as to succession to

1 *Vasudevan* v. *Secretary of State for India* (1887) I. L. R. 11 Mad. 157 at 163 and 164 2. Ibid p. 173.

3. A. S. 794 of 1879 referred to in Moore's Malabar Law p. 55.

4. *Vasudevan* v. *Secretary* of State for India (1887) I. L. R. 11 Mad. 157 at 173.

5. *Amayur* alias *Aguthrathan* v. *Ittiheri* (1889) 1 M. L. J. 303 ; also *Lakshmi Amma* v. *Thuppan Nambudri* (1902) I. L. R. 25 Mad. 662.

6. *Kumaran* v. *Narayanan* (1886) I. L. R. 9 Mad. 260.

the illom property. For his position towards his father cannot be worse than that of a divided son for otherwise he could not inherit at all. If that is the position, in the view of the law that now prevails as to succession to self-acquired property the son would inherit his father's property in the absence of undivided sons. So far as the illom of the maternal grandfather is concerned he succeeds to all its rights including the right of *uraima* to which it might be entitled [1]. It is apparently only the eldest son that enters the illom of the maternal grandfather and not the subsequently born ones. The son-in-law himself does not enter the illom of his father-in-law but continues a member of his own illom [2]. As regards the appointment of an heir, as already stated, the person appointed may be an unmarried or a married man. This form of adoption bears resemblance to and is a survival of the Kritrima form of adoption. It is also called *Ayatha Vidhi Dattu*. The adoptee does not lose his rights in his natural family. Where he is authorised to marry and beget issue, the issue when born belong to the illom for whom the child is begotten and the position of the child is the same as that of an adopted son. The last surviving antarjanom is entitled to appoint an heir without the sanction of her husband, such sanction being presumed. The inclination of their Lordships in *Vasudevan* v. *Secretary of State* [3] was that there might be an appointment of heir without a requisition to marry and raise an issue for the illom but the question is left open. The question as to whether these appointments could be made when there are reversionary heirs also is left open. The inclination of their Lordships was against such a restriction. All such restrictions have been held under the ordinary Hindu law to be only recommendations.

137. In *Keshavan Unni* v. *Nicholas* [4] a point was raised as to whether in a case where there were a male and two

1. *Narayana* v. *Trivikrama* M. S. D. 1855 p. 125; *Keshavan* v. *Vasudevan* (1884) I. L. 7 Mad. 297.
2. *Kumaran* v. *Narayanan* (1886) I. L. R. 9 Mad. 260.
3. (1887) I. L. R. 11 Mad. 157.
4. (1912) 23 M. L. J. 165.

female members in an illom, they could direct a person to marry and raise issue for the illom. A finding was returned from the lower court that they could, but that the direction would be bad unless the man or the woman proposed to be married was also constituted heir. Their Lordships did not find it necessary to decide the question as in that case, they found such an appointment. The Sudder decision which is cited with approval in *Vasudevan* v. *Secretary of State* [1], *Tottakara Aluttar Manakal Narain* v. *Trivikram Nambudripad*, [2] does seem to recognise the validity of a direction to raise issue without an appointment of the person directed or his intended wife as heir. Two other kinds of adoption also were referred to in the evidence given in *Vasudevan* v. *Secretary of State* [1]. One is the form of adoption known as *Pattukayyal Dattu* in which the parents on both sides are alive. A widow cannot adopt in this form. This adoption is a Dwamushyayana adoption that is to say the adoptee retains the status in his natural family also. In this form Dattahomam is to be performed. The other form known as *Chenchamathu* form is one in which the widow can adopt. That seems to involve the cutting off from the natural family except for the purpose of offering *Pindam* to the natural parents and succeeding to the natural family in default of other members and the heirs of the adoptee are the members of the adoptive family [3]. In this form though Dattahomam is not necessary, burning a pan of Kusa or sacred grass is done. There is an instance of this kind of adoption in *Sankaran* v. *Kesavan* [4] in which the husband had given direction to his widow to adopt a particular boy and the widow adopted the boy and it was held that the adoption was valid. In *Vishnu* v. *Krishna* [5] it was held on evidence taken as to custom that the adoption of a sister's son was valid among Nambudiris.

1. (1887)I. L. R. 11 M. 157. 2. *Sudder Decisions* 1855 p. 125.
3. *See Parameswaran Narayana Iyer* v. *Nangali Antarjenom* (1893) 10 Tr L. R. 151 which contains a discussion as to the various kinds of adoption prevalent among Nambudiris.
4. (1891) I L. R 15 Mad. 6. 5. (1883) I. L. R. 7 Mad. 3.

CHAPTER XVII

TIYAS, MAPPILLAHS AND OTHER COMMUNITIES: FEATURES PECULIAR TO THEM.

138—Application of Marumakkathayom to other communities—139 Nambudiris 140 Marpillahs—141 Presumption as to Self acquisition 142 Customs—Stridhanam—Kasi—Badi 143 Partibility 144 Tiyas and Iluvas—145 Syrian Christians—146 Other communities - Rules as to

138. Absence of a right to division in the members of a family who jointly own the property belonging to it is not confined to the followers of the Marumakkathayom system. It is as much a feature of the law of the joint family as it obtains amongst the indigenous Brahmins of Malabar called the Nambudiris and the Non-Brahmin Makkathayis. It is also a noteworthy fact that while the Nairs are invariably governed by the Marumakkathayom law, several classes inferior to them are not so. Whether these were formerly subject to Marumakkathayom, which they subsequently shook off, or whether they were never governed by it, must remain unproven, although it is more likely than not that the Marumakkathayom rule governed most of the lower classes at one time and that in course of time they gave up that system in favour of Makkathayom, while the Nairs who were superiors to them in social status found it practically impossible to do so on account of their intimate connection with the Nambudiri Brahmins.

139. It is a curious circumstance that one class of Nambudiris also adopted in very early times the Marumakkathayom system of inheritance. These were the inhabitants of the Payyanoor gramom in the northernmost taluk of North Malabar, and are ordinarily known as *Ammamans*.[1] It is

1. See *Subramanyan* v. *Parameswaran* (1887) I. L. R. 11 Mad. 116.

useless to inquire into the cause of their adoption of the system. Mr. Logan says: "It looks as if the Brahmin immigrants coming along the coast from the north had only been permitted to settle down in those parts after adopting the laws peculiar to it." [1] The native tradition is that the Payyanoor Nambudiris were moved to adopt Marumakkathayom by a desire to satisfy Parasurama who wished that the matriarchal system should be followed by the Brahmins of Malabar inasmuch as he had created the country for the satisfaction of his deceased mother. There is no historical account worthy of examination as to the cause of the adoption of Marumakkathayom by the members of only one out of the sixty-four communities of the Nambudiris. It should not be supposed that the Payyanoor Nambudiris are any the less subject to Vedic rules of religion than their brethren of the other gramoms or communities in consequence of the different rule of inheritance to which they are subject. In all matters of religion and ceremonial rites the rules governing them are exactly the same as those obtaining among the other Nambudiris. Their marriage is as much a sacrament as the marriage of the Nambudiris of the other gramoms. To adapt it to the system of inheritance through females, they use the well known formula of the Smritis applicable to the marriage of a girl whose issue are intended to become the children of her father [2]. Among the other Nambudiris the formula is not used except where the father of the bride has no son the formula being "this girl without a brother I give to you . . . . . the children born of her shall be my children." The Payyanoor Brahmins adopt this formula in all cases but omit the words "without a brother". The girl does not leave her father's house but continues to live in her own family even after her marriage. Her children have no right to inherit to their father

1. Logan's Malabar Manual Vol. I p. 273.

2. Manu, Chapter XI 127.

while they become entitled to the properties of their maternal uncle's family. Whether the wife herself has any right to succeed to the separate property of her husband, whether his children would be entitled to succeed him if his natural illom should become extinct, whether he is himself entitled to succeed to his children when there are no other members in the natural family of their mother, are questions as difficult of solution as most other questions of inheritance in Malabar Law. *Prima facie* there is no reason why his wife or children should not succeed to his property.

110. The Mahomedans of North Malabar also mostly follow the Marumakkathayom law of inheritance and adopt the rule of non-division. This was due to the fact that a large portion of the Sudra community followingMarumakkathayom law embraced Mahomedanism *en masse*. Mr. Logan is not correct in his statement [1] that the Mahomedans settled in North Malabar, changed the rule of inheritance previously prevalent among them and adopted the Marumakkathayom rule. This seems to be *prima facie* extremely improbable. On the other hand it is very natural and very probable that when a large section of a community adopts a new religion the converts should retain the rules of inheritance to which they were previously subject, and it is also extremely likely that the heads of the new religion should encourage conversion by making the change as easy and agreeable as possible to the new converts. The fact, however, is beyond dispute that Marumakkathayom is the prevalent system of inheritance in most of the Mahomedan families north of Calicut. Even in Calicut and further south, one occasionally finds the adoption of the Marumakkathayom rule, but the instances are rare, and the Courts do not encourage the plea that Marumakkathayom regulates inheritance in the family. Even in North Malabar, the Sudder Court had at first refused to recognise the usag of eMarumakkathayom among the Mappillahs [1]. But

1. Malabar Manual Vol. I. page 275.

the usage was afterwards recognised by the same Court [2].

141. Notwithstanding the large prevalence of the Marumakkathayom rule in North Malabar there does not seem to be any general presumption that all Mahomedans are governed by it until the contrary is proved. It is one of the circumstances to be taken into consideration in arriving at a conclusion as a question of fact whether the parties are governed by the Mahomedan Law or by the Marumakkthayom Law [3]. The question more often has been as to who are the heirs to the self acquired property of a Mahomedan in North Malabar whether those who would be entitled to succeed under the Marumakkathayom Law, that is his tarwad, or his heirs under the Mahomedan Law and the decisions of the Courts have not been uniform on the subject. The presumption should be in favour of the applicability of the rules of the Marumakkathayom system, especially if the supposition is correct that the Marumakkathayom was the prevalent system of inheritance and that the people have simply stuck to it notwithstanding their conversion to Mahomedanism. That this often takes place is clear from the decision of the Privy Council in *Abraham* v. *Abraham* [4]. At first the Sudder Court was inclined to disallow a mixed system of descent, the Marumakkathayom rule governing the descent of tarwad property and the Makkathayom rule governing the self-acquisition [5], and so was Mr. Holloway while he was Judge at Tellichery [6]. But if a community changing its religion could either accept the rules of inheritance prevailing among the followers of that religion or adhere to the rules which formerly governed them, it is difficult to see on what principle it could be held that they could not accept the

1. 1 Sudder Decisions p. 29.
2. *See* Moore's Malabar Law p. 323.
3. *Kuchambi* v. *Kalanthar* (1914) I. L. R. 38 Mad. 1052.
4. (1863) 9 M. I. A. 195.
5. S. A. 269 of 1855.
6. Moore's Malabar Law, p. 326.

system prevailing among the adherents of their new religion in part while sticking to their old system in part. The Privy Council was prepared to allow them to do so in *Serumah Umah* v. *Palathan Vittil Marya Cooty Umah* [1]. In *Illika Pakramar* v. *Kutti Kunhammad* [2], Collins, C.J. and Shephard, J. apparently proceed on the view that the Marumakkathayom rule should be deemed to govern the case in the absence of proof that the rule of Mahomedan law was adopted in the community or the family. The learned Judges refer to two previous unreported cases, in one of which it was held that the Mappillahs (so the Mahomedans of Malabar are called) are governed by the Marumakkathayom law with respect to the devolution of the self-acquired property, while in the other case it was held that the Marumakkathayom rule had been departed from in the particular family. Their Lordships were of opinion that the question did not really arise in the case and decided it in on that ground, but were prepared to hold that no usage contrary to Marumakkathayom law had in fact been proved. On the other hand, in *Assan* v. *Pathumma* [3], Subramania Iyer, J. with whom Davies, J. concurred said," Though the Marumakkathayom law applies to joint property held by a Mopla as a member of a tarwad, it does not follow that it necessarily applies to property not so held. Now there can be no doubt that even in the case of Moplas of North Malabar the Mahomedan Law as the law of their religion and their original law is their general law, the Marumakkathayom rules in regard to Moplas who follow them, being rules of later adoption (Logan's ' Manual' Vol. I, page 273) and forming, so far as they go in the case of such persons, exceptional rules modifying the general law, and though where a custom is proved to exist it supersedes the general law, yet inasmuch as it is the latter that still

1. (1871) 15 W. R. (P. C.) 47.
2. (1893) I. L. R, 17 Mad. 69.
3. (1899) I. L. R. 22 Mad. 494 at 505.

regulates all beyond the custom, the Mahomedan Law must be taken to govern the devolution of the separate and exclusive property of a Mopla, notwithstanding that he is a member of a tarwad owning property subject to the Marumakkathayom law except where it is shown that the Mahomedan Law has, even in regard to the separate and exclusive property of such a person, been superseded by rules established by usage or otherwise." Now the observations of the learned Judge might be accurate, if his hypothesis were correct that the Mappillahs were originally followers of the Mahomedan Law and that they subsequently discarded a portion of it in favour of certain rules of Marumakkathayom law. The learned Judge refers to the passage in Mr. Logan's book which has already been referred to. But Mr. Logan cites no authority whatever for his statement, and as already said it is probably not well founded. At any rate it cannot be assumed as a fact that the Mahomedan Law governed the Mappillahs previous to their adoption of the Marumakkathayom system. Such being the case, and the dominant prevalent system being Marumakkathayom, the presumption should be that the Mappillahs are governed by all the rules of property of the Marumakkathayom law unless the contrary is established. It may be that even if they were originally governed by Marumakkathayom law to which they adhered after their conversion to Mahomedanism, they adopted the Mahomedan rules of inheritance in certain cases and that those rules are therefore binding on them. Unless it is proved that any particular rule of Mahomedan Law is recognised by the community as a binding rule the Marumakkathayom rules must be held to prevail. In *Kunhimbi Umma* v. *Kandi Moithin* [1] Subramania Iyer and Benson, JJ. observe that *Assan* v. *Pathuma* [2] should not be understood as laying down that in every case between Mahomedans in North Malabar, even

1. (1903) I. L. R. 27 Mad. 77.
2. (1899) I. L. R. 22 Mad. 494.

when they are members of a Marumakkathayom tarwad, the devolution of self-acquired property is governed by Mahomedan law unless the contrary is shown, and the learned Judges go on to say that the presumption would often be in favour of the Marumakkathayom rule of devolution, and in the particular case, they held that the self-acquisition of the deceased passed to his Tarwad. The following observations of the Privy Council in *Murtaza Husain Khan* v. *Muhammed Yasin Ali Khan* [1] lend support to the view that where it is admitted that the family is governed by the Marumakkathayom law as regards the tarwad property, the presumption is that the self acquisition of the individual members descends according to that law. Their Lordships say: "The Muhammadan Law makes no distinction between ancestral and self acquired property and recognises no principle of difference in the matter of lineal and collateral succession as is the case under the Mitakshara which divides inheritance into "unobstructed and obstructed heritage." All classes of property, whether ancestral or self acquired follow one rule of devolution. If a custom governs the succession to the ancestral estate the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death ; and it is for the person who asserts that those properties follow a line of devolution different from that of the Taluka to establish it." Unlike the Nambudiris, it is usual for all the males of a Mahomedan family to marry. It sometimes happens that while a Mahomedan husband belongs to a family governed by the ordinary Mahomedan Law, the wife belongs to a family governed by the Marumakkathayom system, or vice versa. The property of the father descends to his children and others according to the Mahomedan Law. In the case above cited, *Assan* v. *Pathumma* [2] Mr. Justice Subrahmanya Iyer suggests that property so descending will in its further course also be governed by the Mahomedan Law

1. (1916) I. L. R. 38 All. 552 at 568.
2. (1899) I. L. R. 22 Mad. 494 (P. C.)

reciprocity being the basis of Mahomedan Law of succession. This seems to be hardly right since the rule of succession depends upon the personal law of the propositus and has no reference to the mode of acquisition of the property. In S. A. 1289 of 1907 it is stated generally that in the absence of usage to the contrary property inherited under the Mahomedan Law will pass, in further descent under that law. This conclusion is said to be in accordance with the decisions in *Chathunni* v. *Sankaran* [1], *Assan* v. *Pathumma* [2] and *Kunhumbi Umma* v. *Kandi Moidin* [3]. On examination, it will be found however that only the decision in *Assan* v. *Pathumma* [2] supports this view. In *Chathunni* v. *Sankaran* [1] it is suggested that it might be open to a person to elect whether he would be bound by the one or the other system in respect of his self-acquisitions. Whatever is the right view as regards the further descent of property derived from a person governed by Mahomedan Law the gift by a father governed by Mahomedan Law in favour of his wife and children who are members of a Marumakathayom tarwad is presumed to have been given by him with intent that they should hold the property with incidents of Tarwad property [4]. An anomalous position undoubtedly but it is perhaps too late to question it. Madras Act I of 1918 now provides that the property of any Mapillah governed by Marumakkathayom or Aliyasanthana Law to which he is entitled not being Tarwad property unless he is solely entitled thereto shall notwithstanding any custom to the contrary devolve upon his heirs according to the Mahomedan Law.

142. The recognition of the Marumakkathayom rule of inheritance and at the same time of the Mahomedan rule as to marriage has led to the growth among Mappillahs of certain customs. For instance, in *Bappan* v. *Mukki* [5] it was found that

1. (1884) I. L. R. 8 Mad. 238.
2. (1889) I. L. R. 22 M. 494.
3. (1903) I. L. R. 27 M. 77.
4. *Kunhacha Umma* v. *Kutti Mammi Hajee* (1892) I. L. R. 16 Mad. 201 (F. B.) ; *Pathumma* v. *Abdulla Haji* (1907) I. L. R. 31 Mad. 228.
5. (1883) I. L. R. 6 Mad. 259.

among the Mappillahs of North Malabar, there existed a custom according to which the junior members of Mappilla tarwads were entitled to maintenance from the tarwad when living in the houses of their consorts and also to a higher rate of maintenance when living with their consorts than when living single. There is also the practice for the relations of the wife to make what is called a Stridhana gift to the husband to enable him to maintain her. The gift ordinarily reverts to the family though not invariably [1] on death of the wife without issue or on divorce [2]. This gift seems to correspond to *Kasi* in South Kanara which has similar incidents [3]. In the last mentioned case, reference is made to a kind of gift known as *Badi* where the gift does not in those circumstances, revert to the family. The husband has no duty to maintain the wife if she lives away from him [4]. On wasting the stridhan a second claim cannot be made for maintenance from the tarwad. The peculiar tenure known an *Strisothu* in which only female descendants of the grantee are entitled to the property was set up in *Mammad Hajee* v. *Mussan Hajee* [5]. It is not clear whether anything more than property held on Marumakkathayom system of joint ownership was intended to be meant thereby. At any rate the Canara counterpart of it—known as *Pennumoola* has been held to import no more. Such a tenure is of course unknown to Marumakkathayom law [6] " and is opposed to the Tagore case."[7] But this view does not preclude the existence of a customary tenure of that kind.

143. In Malabar more than anywhere else, it is still an age of usage, and not of written law ; and as seen in the case of Nambudiris, the fact that any sect or community is

1. S. A. 1810 of 1916.
2. *Pakrichi* v. *Kunhacha* (1911) I. L. R. 36 Mad. 385.
3. *Ismail Beari* v. *Abdul Khader Beari* (1883) I. L. R. 6 Mad. 319.
4. *Mammad Hajee* v. *Mussan Hajee* (1910) M. W. N. 398 ; *Kunhi Pathumma* v. *Moosan Mammad* (1912) M W. N. 11 : 11 I. C. 300.
5. (1910) M, W. N. 398.
6. *Maliya Kalakath Bava* v. *Pathumma* (1912) 16 I. C. 689.
7. I. A Supp. Vol. P, 47.

governed by Makkathayom or the rule of descent through sons is no ground for the presumption that the persons who are the owners of the property are entitled to enforce division and to obtain possession of their specific shares of the property as what they are individually entitled to. Such a presumption would be unwarrantable in the early Hindu Law, and is equally unwarrantable in Malabar with respect to the several classes of Hindus in Malabar, for they are not governed by the Hindu law as subsequently developed which allows compulsory partition.

144. The question has arisen more than once in the case of Tiyas who are supposed to correspond to the caste of Shanars or toddy drawers in the Southern Districts of the Madras Presidency. In *Raricham* v. *Perachi* [1], the District Judge of Calicut ruled that the Tiyas are governed by all the rules of the Hindu Law, as expounded in the Mitakshara unless a custom be proved against the applicability of any particular rule. And he held therefore that the widow of a deceased Tiya was entitled to succeed to her husband's self-acquired property in preference to his undivided brother, no ancient and invariable usage to the contrary having been made out. The High Court (Parker and Handley, JJ.) overruled this view and held that it was not necessary for the brother to prove any custom in derogation of the law, for though the Tiyas are Hindus, they are not governed by the Hindu Law as expounded in the Mitakshara, that what the Court is to find out in each case is whether any particular rule of Hindu law is applicable to the community. In *Raman Menon* v. *Chathunni* [2], Muthuswami Iyer and Best, JJ. held, accepting in second appeal the finding of the Subordinate Judge of Malabar, that a member of a Tiya family was not entitled to partition. Now the Subordinate Judge's finding was based on the ground first, that there was no presumption of partibility of family property in the case of

1. (1891) I. L. R. 15 Mad. 281.

2. (1893) I. L. R. 17 Mad. 184.

Tiyas and that the evidence was not sufficient to support a custom of partibility. The Subordinate Judge went too far in laying down that there was no presumption of partibility. For in the first place, the presumption must be that all joint property is partible, that being the rule of Equity recognised in the absence of any usage to the contrary, and secondly, the Hindu rule of partibility must prevail unless displaced by evidence that some other rule is recognised by the community as binding upon it. The presumption is not that the Hindu rule of law is applicable until displaced by proof of special custom in the sense of usage opposed to that law, acted upon invariably and uniformly, but the presumption does go to the extent that the rule of Hindu law is the usage applicable to any particular community of Hindus. It is unnecessary to discuss the question further as the High Court merely accepted the finding of the lower appellate court on the question and did not by itself decide the question whether a member of a Tiya family is entitled to partition or not. Moreover, the decision would have no application except to Tiyas of the particular place to which the parties belonged, unless it be proved that the Tiyas of any other place are governed by the same usage as the Tiyas of that place. In *Velu* v. *Chamu* [1] Subramania Iyer and Davies, JJ. held that the decision in *Raman Menon* v. *Chathunni* [2] was not applicable to members of the community in Palghat who are generally called Iluvas, even if Iluvas and the Tiyas were originally the same people. The Tiyas and Iluvas of South Malabar are supposed to have immigrated originally from Ceylon. It seems to be doubtful whether the Tiyas of North Malabar are the same race or people as those of South Malabar. The former are governed by the Marumakkathayom law and not Makkathayom law as the Tiyas of South

1. (1898) I. L. R. 22 Mad. 297.
2. (1893) I. L. R. 17 Mad. 184.

Malabar. There is no historical reason for they alone changing the rule of inheritance if they belonged to the same race of people as the south Malabar Tiyas and not the latter. In *Imbichi Kandan* v. *Imbichi Pennu* [1] Parker and Subramania Iyer, JJ. held that in the case of divided property the widow succeeds to a Tiyan in preference to his brother, and that the decision in *Raricha*n v. *Perachi* [2] with respect to the self-acquired property of an undivided Tiya did not apply. As one of the reasons for the preference of these to divided relations, the fact that the former are members of the same Tarwad is mentioned. There can be no doubt that the learned Judges are perfectly right in adopting the Mitakshara rule in the absence of satisfactory evidence that some other rule was applicable, and the decision is not inconsistent with the rule in *Raricha*n v. *Perachi* [2] that if evidence of some other rule is adduced, it should not be tested by the requisites of a special custom opposed to the law. In *Kunhi Pennu* v. *Chiruda* [3] the property in question had been acquired by one Raman and on his death it descended to his son Sankaran. On the death of Sankaran the question arose as to whether the property belonged to the widow of Sankaran who would be the heir under the ordinary Hindu Law or to his mother who would be the seniormost lady in the family who of course would hold it on behalf of the tarwad. It was held that it was taken by the widow. In S. A. 518 of 190[illegible] the widow of predeceased nephew put forward a preferential right to succeed as against the daughter of the deceased on the ground that the daughter had been married away and as such was not entitled to succeed. Their Lordships held that no custom had been proved in derogation of the daughter's right of inheritance under the Hindu law and the daughter was entitled to succeed under that law. In *Thaikkandhi Pokkaucheri* v.

1. (1895) I. L. R. 19 Mad. 1.
2. (1891) I. L. R. 15 Mad. 281.
3. (1896) I. L. R. 19 Mad. 440.

Achuthen [1] their Lordships Sadasiva Aiyar and Spencer, JJ. held that the ordinary Hindu law applied to the Tiyas in the absence of proof of usage to the contrary and in the absence of proof of such a custom a married daughter had no right of residence in her father's house after the marriage. In S. A. 580 of 1917 it is questioned if the rule of impartibility applies to all famlies among the Tiyas. Dr. Ormsby, late of the Travancore High Court, says in his outlines of the Marumakkathayom Law that the Iluvars of South Travancore follow Marumakkathayom Law, as also Iluvars of North Travancore, but while in the case of the former the children are entitled to inherit half their father's self-acquisitions if made during the life-time of their mother, no such rule exists in the case of the latter. Dr. Gundert's statement [2] that the Tiyas in Travancore follow the Makkathayom system seems to be wrong, being opposed not only to Dr. Ormsby's statement referred to above, but also to the carefully compiled Census Report of Mr. N. Subramania Iyer [3].

145 Amongst the Syrian Christians of Travancore, there seems to be a peculiar kind of joint family property. Where a husband and wife are married according to what is called the *Kettikeruka* system, the husband acquires a community of interest in the wife's property, and neither the wife nor the husband can alienate or encumber the property without the consent of the other. [4]

146 There are various communities in Malabar that are governed by Makkathayom system, with respect to whom the courts have not yet decided whether the members of the family are entitled to enforce partition. Mr. Logan gives a list of

1. (1920) 39 M. L. J. 427.
2. Logan's Malabar Manual Vol. I, p. 155.
3. Travancore Census Reports, 1901, p. 279.
4. *Kuria Marian* v. *Raman* 2 Tr. Sud. Dec. 30.

communities governed by the Makkathayom law. [1] other and Some what varying lists are given by Dr. Gundert and in the Malabar Gazetteer. As already stated, many of the lower castes are governed by that system. Owing to the poverty of these castes and owing also to the fact that they generally effect voluntary separation whenever necessary the question of partibility seldom comes before the courts. But when it does, the rule laid down in *Rarichan* v. *Perachi* [2] as to the nature of the evidence required to prove the absence of a right to compulsory partition, will have to be followed, while at the same time the onus of proving the absence of the rule of partibility will be on the person who asserts it. With respect to several of these communities again, the system of inheritance will be found to be a mixed or as it has been called pie-bald system, and it is far from easy in many cases to determine the rightful heir.

1. Vol. I. pp. 154, 165. In *Kannu Pillai* v *Gopala Nair* 26 I. C. 337 : 1914 M.W. N. 883 it was found that the Malabar Law was inapplicable to chetties.
2. (1891) I. L. R. 15 Mad. 281.

CHAPTER XVIII.

ALIYASANTHANA LAW.

147. Aliyasanthana Law — Bhutalapandya's Kattukattalai — Its value and authenticity. 148. Points of difference between Marumakkathayom and Aliyasantanam. 149. Communities governed by.

147 Aliyasanthana Law as the name implies is the rule of inheritance under which property descends in the line of nephews. The term it will be noticed is the exact Canarese equivalent of the Malayalam term Marumakkathayom. The people that follow this system are to be found in Canara and mostly speak Tulu. The word corresponding to *Marumagan in Tulu is Marumaya* but the word in use among the people to denote the system of law is the Canarese word—Aliyasanthana Kattu or more shortly Aliyakattu. The rules of this system with the traditional account of its origin are to be found in a Canarese pamphlet known as Bhutala Pandya's Kattu Kattalai. The pamphlet first attracted notice in 1843 and formed the basis of a decision in A. S. No. 82 of 1843 by Mr. Anderson then Civil Judge of Mangalore. It was printed and published in the year 1859 by the Basel Mission Press at Mangalore. It has been translated more than once into English. In *Munda Chetty* v. *Thimmaju Hengsu* [1] the decision proceeded entirely on a construction of this treatise. It is again referred to as authoritative in *Subbu Hegadi* v. *Tongi* [2]. Its authority was however impeached by Dr. Burnell who denounced it as a recent forgery [3]. The doubt thus cast found expression in *Empress* v. *Koraga* [4],

1. (1863) 1 M. H. C. R. 380.
2. (1869) 4 M. H. C. R. 196.
3. *Nelson's Hindu Law* pp. 95 and 98 ; *Dr. Burnell's Vyavahara Nirnaya.*
4. (1883) I. L. R. 6 Mad. 374.

Devu v. *Deyi* [1] and *Secretary of State* v. *Santaraja Shetty* [2]. It can no longer be regarded as a safe basis for decision. Its dates are undoubtedly wrong and its history may be unreliable. The pamphlet however does not purport to be the composition of Bhutala Pandya. Its language is not ancient but there is nothing inherently improbable in its being three or four centuries old. A genuine Bhutala Pandya seems to have ruled about the 13th century. The pamphlet does not bear any particular date and the reflection upon its history does not detract from its being a fairly ancient work. In *Secretary of State* v. *Santaraja Shetty* [2] certain copies of the work dating much earlier than 1843 were produced. There is a very considerable amount of verisimilitude about its setting. In these circumstances, much weight cannot be attached to Dr. Burnell's criticism mainly based upon the contents and the language of the work. Many competent critics have pronounced it to be a fair record of the social practices of the District. Though its value in deciding doubtful points of Aliyasanthana law may be slight, there is no reason why it should be altogether discarded. Some of the classes who are noted therein as observers of Aliyasanthana are now found to be followers of Hindu Law. For instance, goldsmiths (*Annappachari* v. *Venkappachari* A. S. 21 of 1890 and *Nagamma* v. *Fernandes* S.A. 1662 of 1888) and oilmongers or ganigas (*Rebello* v. *Lingu* S. A. 1051 of 1892) but this may be a case of subsequent adoption. According to this work Aliyasanthana law was not the original law of the country. The circumstances under which it was introduced were as follows : In the Pandya country (not the historic Pandya country but some place of that name in Mysore) it is said that there was a merchant of the name of Deva Pandya who built some new ships but when he was about to launch them a demon called Kundodara put obstruction in the way and required a human

1. (1885) I. L. R. 8 Mad. 353.

2. (1913) 25 M. L. J. 411.

sacrifice if he should let the ships go. The merchant asked his wife to give one of his children but she not only refused to do so but also left the place and went over to her parents. He had a sister Satyavati by name. She was prepared to sacrifice her son for his sake. Kundodara however perceiving that the boy was endowed with auspicious marks countermanded the sacrifice and made him King under the name of Bhutala Pandya. Bhutala Pandya was anointed King on the throne of Vikramaditya. In the meanwhile, the ships of Deva Pandya returned with *Sidha rasa* (i.e., a liquid possessing the virtue of converting iron into gold) but for their unloading there was the same difficulty as was experienced in launching them. The wife was again approached to part with her children which she refused as before and went away renouncing any claim on their behalf to those goods. In these circumstances the people decided that those goods should belong to Bhutala Pandya as nephew. Kundodara declared that thereafter Aliyasanthana law should govern both the ruler and the ruled and rules were accordingly framed and recorded. Bhutala Pandya threatened the penalty of extinction of family to any person that violated this rule.

148. The system thus promulgated differs but slightly from the Marumakkathayom system. In its main features, viz., impartibility, descent in the line of females and non-recognition of marriage as a legal institution it completely agrees with the latter. In *Munda Chetty* v. *Thimmaju Hengsu* [1] the Court following a remark in Strange's Manual states that the Aliyasanthana system differs from that of Malabar only in more consistently carrying out the doctrine that all rights to property are derived from females. Observations to a similar effect are to be found in *Subbu Hegadi* v. *Tongu* [2]. These observations are responsible in the main for the recognition of rights of management in females, for the evidence given in *Devu* v. *Devi* [3] disclosed a state of facts not dissimilar to

1. (1863) 1 M. H. C. R. 380. 2. (1869) 4 M. H. C. R. 196.
3. (1885) I. L. R. 8 Mad. 353.

that in Malabar. It is now too late to reagitate the question and the eldest member whether male or female would be entitled to manage. The observations in *Mahalinga* v. *Mariyamma* [1] might give plausibility to the preferential claim of the female if of equal age with the male. In view of the present theory that males are equally proprietors with females, joint management would in those circumstances be the proper course. This is the first point on which the Aliyasanthana law differs from the Marumakkathayom law. Another point on which it differs is on the question of the succession to separate property. In *Antamma* v. *Kaveri* [2] it was held on evidence of custom that the separate property of an individual member went to his nearest heirs and not to the tarwad as it was assumed to go under the Marumakkathayom system the Court observing that it was impossible to assume that on any point the two systems were identical. The view as to Marumakkathayom law assumed in *Antamma* v. *Kaveri* [3] was accepted to be correct by the Full Bench in *Kuttasseri Eriat Govindan Nair* v. *K. G. Sankaru Nair* [4] as regards succession to the property of males; as regards the property of females a different view has since been taken in *T. Krishnan Nair* v. *T. Damodaran Nair* [5] so that to this extent the Aliyasanthana and Marumakkathayom laws agree. In the later case the view is expressed that the earlier decision was wrong. These are the main points on which the two systems differ though there are other minor points of difference in detail due in large measure to differing social and economic conditions. As an instance of the former, take the rule stated in many cases as regards the power of the karnavan to grant othis and kanoms. The practice of granting othis and kanoms in the

1. (1889) I. L. R. 12 Mad. 462.
2. (1884) I. L. R. 7 Mad. 575 : explained in *Manjappa Ajri* v. *Marudevi Hengsu* (1916) I. L. R. 39 M. 42 : 30 M. L. J. 204.
3. (1884) I. L. R. 7 Mad. 575.
4. (1909) I. L. R. 32 Mad. 351 : 19 M. L. J. 350.
5. (1912) I. L. R. 38 Mad. 48 : 24 M. L. J. 240

ordinary course of management is unknown in Canara and no suggestion has ever been made that the manager in Canara has such a power in the absence of necessity. The most marked difference observed is in marriage customs. Whereas in South Malabar the practice is for the female to reside in the tarwad house during marriage, under the Aliyasanthana law the females usually reside with the husbands in their tarwad houses. The practice is referred to in a decision of 1852 in these terms: "In Canara where the wife follows and lives in the house of her husband she has to leave her estate to the management and integrity of the male relations who may easily deceive her of her property." This social practice along with the recognised liability to pollution and right to participate in funeral ceremonies though founded, on *a priori* considerations of orthodox theory, not sufficient to justify finding a custom of legal marriage would undoubtedly be sufficient to justify the charge of their maintenance on tarwad income. Another marked difference between the social practices of the two people, is the absence of inter-caste marital relations. Though referred to in Bhutala Pandya's Kattu Kattalai the relationship is plainly regarded therein as illicit relationship not indeed involving degradation of caste but nevertheless one not looked upon with approbation.

149. No class of Brahmins follow the Aliyasantana rule of inheritance nor do all the Sudra classes. Even among the Bants who form the most influential among the followers of this system, there is a class known as Parivara Bants who follow the ordinary Hindu Law. Besides the Bants, the *Billawas* or Tulu speaking toddy-drawers, the *Halepaikas* or Canarese speaking toddy-drawers, *Mogers* or fishermen, a section of *Gudigars* or the wood-carvers, *Medwales* or Tulu washermen *Kelasis* or Tulu-speaking barbers (those in the Northern part of Canara speak Canarese and follow the ordinary law) *Malekudeyas* or hilltribes, *Kumbaras* or potters, *Belleras* or basket-makers, and some *Mappillahs* in the Kasargod taluk follow the

Aliyasanthana Law. Most of the Canarese speaking people (like Bovis, Kotas, Kurumbas, Valivaligas, Kanchargaras, Devangas, Patnegars and Agasas and all the Maharatti or Konkani speaking people like Mahrathis, Sonegars, Kharvis and Kajains (barbers) follow the ordinary Hindu Law. The Pariahs so far as one is able to judge are mostly governed by the ordinary Hindu Law. There is a large body of Jains in Canara. The *Indras* or priestly class and a section among others who speak Canarese follow the ordinary Hindu Law but the bulk speak Tulu and follow the Aliyasanthana Law.

CHAPTER XIX.

STANOMS.

150. Stanom—origin and definition 151. Features of, 152. Status of stani in the family 153. Succession to stanom 154. Test of 155. Failure of heirs to stanom, temporarily—Effect of 156. Subsequent birth of a qualified person—Effect of. 157 Estate of stani—Nature—Powers of disposition 158. Apportionment.

150. The word 'stanom' is of Sanskrit origin, and means 'position' or 'place' and secondarily in the Malayalam language a position of dignity. In the case of certain positions of dignity, there is property attached for the maintenance of the dignity and for the fulfilment of the duties attached to the position. As a technical word, 'stanom' means a position of dignity of this kind, that is, one to which certain specific property is attached, and which passes with it, and is held by the person who fills the stanom for the time being and who is known as the '*stani*'. This chapter deals only with stanom in the technical sense of the word and not with other positions of dignity to which no properties are attached. The origin of stanom is by no means clear and is more or less a matter for speculation. In the first instance, it seems to have owed its origin to political exigencies and was a creature of public law. The kings who ruled over Malabar were mostly governed by the Marumakkathayom law, according to which all property is held in common by the whole family, and the senior most member succeeds to the management. The rule of succession to the Crown was exactly the same, the eldest member of the Royal family, whether related to the ruling prince as a brother, cousin, or nephew, being entitled to succeed him in

the musnad. Naturally it was considered necessary in the circumstances that for the maintenance of the dignity of the ruler he should own properties in which the members of the tarwad as such had no right or interest and which would pass with the Crown to his successor. The necessity for such an arrangement was all the greater because there was no organised system of land tax in Malabar under the indigenous regime. Similar considerations would be applicable to those who are high in the line of succession; and consequently in the family of the Zamorin who ruled over the greater part of Malabar, there were properties attached not only to the stanom of the reigning prince, or Zamorin, but to the four next in succession (and apparently five in former times). The same system prevailed in the families of the Palghat, Walluvanad and other Rajas as well as in the families of some of their subordinate chieftains. But it should not be supposed that stanoms with separate properties attached to them existed in the families of all the former ruling chiefs. Such is not the case, for instance, in the Chirakkal family, in which the whole property belongs to the tarwad as a whole, and there are no properties specially attached to the position of the senior Raja, the 2nd Raja and so on. Whether the properties attached to the stanoms were originally the result of endowments by the State or of severance of a portion of the family property for the benefit of the stanom holders, it is not possible at this time to state with any certainty. Mr. Wigram adopts the latter view [1]. The learned author says :" Probably the first step was the division of Kovilagom property into *Ann Vazhi* and *Penn Vazhi* i. e., male and female property, the former being under the management of the senior Rajah, and the latter under the management of the senior female in the Kovilagom. The next step was the separation of certain portion of the common property for the individual enjoyment of the senior Rajahs, the other members of the family, male and female,

1. Second Edition, p. 251.

being supported in the Kovilagom in which they were born." There is no foundation for the assumption of the division of the property into *Ann Vazhi* and *Penn Vazhi*. There is no instance where some property belongs to males as a body, and other properties of the family to females as a body. There are instances where property has been attached to the dignity not only of the senior male but of the senior female also. In the families of Calicut and Walluvanad Rajahs, the eldest female holds a stanom and manages the stanom properties attached to it. In the former family the stani is known as the Ambade Kovilagom Tamburatti and in the latter the stani is known as the Kolattur Tamburatti. But where individual property is created, it is always in favour of a stanom holder, male or female, and there is no warrant for the statement that the property was divided into that belonging to males as a body and that belonging to females as a body. It is true that in some case and specially in the case of the Punnathoor family, where there are stanoms in a family, all the property not attached to the stanom is spoken of as *Penn Vazhi* property, but *Penn Vazhi* in this context means only 'belonging to the whole family.' The word is used probably because descent is traced through females in the case of such property and does not depend on succession to the stanom. It is also the case that in the Kovilagoms of Calicut and Walluvanad Rajahs and probably in the case of some others though certainly not in all the families having stanoms, the management of the family estates, as opposed to the stanom estates, is vested in the senior lady of the family who is assisted in the management by such male members as she may select for the purpose. It appears probable that in the case of some chieftains and public officers, stanoms were created by the ruling king, who, when he appointed the head of a particular family to an office with hereditary succession attached also certain lands for the maintenance of the office-holder; some such stanoms seem to have been created by the Zamorin—that of Para Nambi, being a prominent

instance which has come up before the Courts. In addition to the families of princes and chieftains, there are other families also in which we find 'stanoms' in the technical sense though without any particular dignity attached to them. The creation of stanoms in such cases was merely the result of imitation. When a family became very opulent and influential, it was sometimes deemed necessary in order to keep up its social position and influence that the head should be able to maintain a certain amount of state, and for that purpose the members of the family agreed to set apart certain property for him, and such property would descend to the head of the family for the time being.

151. Whatever may be the origin of the stanom in any particular case, whether it was the result of public law, or owed its origin to a grant by the Ruling Chief to the holder of an office, or was merely the result of an arrangement amongst the members of a tarwad for the maintenance of its social prestige and influence, the property vests not in the family of the holder, but in himself individually and descends to the person who succeeds to his dignity. Another feature is that the stani's ownership and interest in the property of his tarwad ceases on his accession to the stanom. [1] His relationship and consanguinity with the family does not and cannot cease. For purposes of religious, funeral and other ceremonies, the stani continues to belong to the family. The position is not that of a person given away in adoption to another family who, for civil purposes, ceases altogether to be a member of his original family and is no longer entitled to succeed as heir to his natural relations [2]. If such be the case, the members of his natural family would also be no longer entitled

1. S. A. 984 of 1893, *Patinharkara Vallabhan Chattan Raja* v. *Rama Panicker* (1914) 8 M. L. J. 669 *Krishnan Kidavu* v. *Raman* (1915) I. L. R. 39 Mad, 918.

2. Manu IX 142 Dattaka Mimamsa VI, Ss,6—8, Dattaka Chandrika II, 18-20 Mayne's Hindu Law and Usage p, 2:2.

to succeed to him. Such is not the position of the stani. It is rather that of a member of a tarwad who separates himself from it by division. His accession to the stanom operates as a severance from the family. In consideration of his solely becoming entitled to the stanom property it was probably considered fair that he should give up his existing right in the property of the tarwad. But he and his tarwad will have the same right of succession to the properties of each other as if his severance from the family had been the result not of his accession to the stanom, but a voluntary division between him and the rest of the family.

152. It is assumed in *Veerarayan* v. *Valia Rani* [1] that the view enunciated here is the correct view, for though the point did not arise for decision, their Lordships say, "all property acquired by the holder of a stanom, which he has not disposed of in his lifetime, or shown an intention to merge in the properties attached to the stanom, becomes, on his death, the property of the Kovilagom in which he was born." This would not be the case if the stani is altogether cut off from his family by his accession to the stanom. It may be said that the rule of succession which is assumed is inconsistent with a divided status for then the property should go to his branch but much cannot be made out of this as it was not then settled as to what the rule of succession of a male in those circumstances is to be. This much is certain, that is to say, that the acquisitions of the stani go to his natural heirs in the family whoever they are. Another possible view is that the member having acquired the stanom, he has no further enforceable right in the kovilagom properties though he is not divided from the other members. That would put the male stani's case on the same footing as that of the female stani to be presently referred to. At any rate it has been held that the right of succession to another stanom dependent on the seniority in four Kovila-

1. (1881) I. L. R. 3 Mad. 141.

goms is not affected thereby [1]. The answer to the question whether the stani would be entitled to the property of the tarwad in case all members in the tarwad die will have to be answered much on the same lines. In cases where the stani is a female, her accession to the stanom does not operate even to the extent of a division between her and the rest of the family. For according to the custom in the families of Calicut and Walluvanad Rajahs in such cases, although the woman who succeeds to a stanom loses her interest in the tarwad property her issue if any born after her accession would be members of her natural family with all the rights belonging to such members. Her disqualification in consequence of her becoming a stani to be a member of her family is purely personal and does not affect her issue. In the case of male stanis, no such question can arise, as the children of males belong to the families of their wives and not to their own families.

153. The succession to a stanom is generally determined by seniority in age. It descends to the eldest male member of a family, or sometimes the eldest member in al number of families together, the latter rule being the result of the families having been joint when the stanom came into existence and having afterwards become divided. Stanoms exist n Malabar and in portions of South Canara. The absence of any decisions in the Travancore reports relating to stanoms seems to show that they are scarce in the Travancore State. In the ruling family of Cochin there seem to be private properties belonging to the stanoms of the Rajah and the Elia Rajah, beside the properties belonging to the Royal family as a whole, which latter are said to belong to the Kovilagom, the Amma Thamburan or Valia Rani being the manager or Karnavati of the family as a whole. The constitution of the stanom in the Zamorin's family is described in *Veerarayan*

1. *Palisharkara Vallabhan Chettan Rajah* v. *Rama Varma* (1914) 28 M. L. J. 689.

v. *Valia Rani of Puthia Kovilagom* [1] and that of the stanoms in the Palghat Rajah's family in *Venkateswara Ayyar* v. *Sekhari Varma* [2]. See also Warden's report to the Board of Revenue, dated the 19th March 1841. There does not seem to be any stanom among Nambudiris Amongst the Aliyasanthana people though there are several *Bidus* or chieftainships having substantial properties and malikanas attached to the position and questions have arisen as to the position or powers of the holder, there is no case dealing with the matter. As to the rules of succession, a distinction is made under that system between the mode of succession to ordinary property and to offices. The latter descend only to males and the right is determined on the footing that the family is not divided in respect of the office. [3] There are installations, especially in connection with the chieftainships in which ancient families of the *Seemai* or province are expected to take part. In some cases, a right of nomination by the incumbent among the members of the family is suggested. In one case where the family was extinct, the people of the *Seemai* (or province) were held to have the power of installation [4]. In Bhutala Pandya's Aliyasanthana Rules the appointment of an heir to an extinct family by the heads of families in the province is referred to. One noteworthy feature is that in Canara there is no impression that the holder of the stanom is divided from the family. The point of view suggested in some cases in which the question has arisen is that the members of the family have rights of maintenance in the property of the stanom itself; that is practically assimilating these properties to impartible zemindaries before the recent cases.

1. (1881) I. L. R. 3 Mad. 141. 2. (1881) I L.R. 3 Mad. 384.

3. *Timmappa Heggade* v. *Mahalinga Heggade* (1868) 4 M. H. C. R. 28.

4. *Nagaraja* v. *Deva Raja Karanthaya* (1921) 41 M. L. J. 340 where some duties also were found to attach to the dignity. The junior members were held not to have any interest in or right to maintenance out of the property.

154. The question whether there is a stanom in any particular case must be decided upon the evidence of usage adduced, and the onus is of course upon those who assert that any particalar property belongs to an individual and not to the family to which the individual belongs. It is not sufficient to make a stanom that properties are temporarily allotted to a person filling a particular position ; the evidence must be sufficient to prove a long continued usage recognising the property in question as belonging to the person filling a particular position without any interest in the members of the family to which the person holding the position belongs and without any power in them to terminate the arrangement [1]. Is it open to a family to constitute a fresh stanom ? The answer would probably be the same as to the question whether it is open to the members of a family governed by the Mitakshara Law to constitute certain property impartible and vest it in a single individual with succession according to the rule of primogeniture. In both cases the answer must be in the negative. Impartible estates and stanoms are recognisable only on the ground of custom. They are held not according to the rules of the common law of the land but in a manner different from such rules but sanctioned by usage. It is open to subjects to create rights and estates recognised by the common law; but it is not open to them to create estates contrary to such law on the ground that some estates, contrary to it, are recognised by custom. In the same manner, as no new custom can be now introduced by the consensus of any particular community, so also no individual or family can subject a new estate to the incidents of a special customary tenure at variance with the common law.

155. A question of importance may arise where according to the rules applicable to the succession to a stanom, there

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1. *See Parrakel Kondi Menon* v. *Vadakentil Kunni Penna* (1864) 2 M. H. C. R. 41, *Appunni* v. *Ayenapalli Ekuatha Shanganni* (1871) 6 M H. C. R. 401.

are no persons entitled to the succession Suppose for instance in the case of a stanom tenable by the eldest male member of a tarwad it happens that the family has no male members, what would then become of the properties belonging to the stanom ? If accession to a stanom is similar to adoption into a fresh family then in the absence of members entitled to succeed to the stanom, the property must escheat to the Crown. If, on the other hand, his position is that of a person divided from the tarwad then the property must descend according to the rules of devolution applicable to the property of a divided member. But there is a great difficulty in holding that the property belongs to the stani. The ordinary heirs of the stani could succeed only on the assumption that the property is to go preferentially to the set of heirs indicated by custom and in default to the natural heirs. If the stanom property was dedicated for the purpose by the tarwad, it could easily be held that the purpose failing the property would revert, on the analogy of service and other subordinate tenures to the tarwad. But then that argument would lead to the property going to the State where the endowment was originally by the State unless it could even in such cases, be presumed that the grant should be deemed to be made to *the family* but to be enjoyed by the members indicated by the custom. If those members failed, the property would belong to the family. Village service tenures do afford certain parallels to these stanoms. Mr. Justice Bhashyam Ayyangar in his judgment in *Vidyapurna* v. *Vidyanidi* [1] was of opinion that the stanoms were really corporations sole; if they are, that the property would escheat to the Crown on their failure.

156. Assuming that the property passes to the tarwad, what will be the result if a male member capable of holding the stanom is afterwards born ? Would he be entitled on his birth to succeed to the stanom and its property or should the

1. (1904) I. L. R. 27 Mad. 435.

stanom be deemed to have become extinct and incapable of being resuscitated ? One case of this sort was that of Punnathoor family ; there were two stanoms in the family, held by the eldest male members known as the Valia Rajah and the Elia Rajah. All the male members died including one who had been adopted into the family, and the property passed as a matter of fact into the power of the tarwad. When a male infant was afterwards born, a suit was instituted on his behalf to recover the properties of the stanom of the Valia Rajah, and it succeeded in the Madras High Court. But the question whether the stanom becomes extinct on the extinction of the male members or was only in abeyance during the absence of the male member so as to be capable of being revived was not raised in the case, the contention of the opponents of the infant being that there was no stanom at all in the family and that the whole property belonged to the tarwad. This contention was negatived and the infant obtained a decree for the properties formerly attached to the stanom of the Valia Rajah. If other instances of the kind be searched out, it would be probably found out that the usage has been in accordance with the view assumed in the Punnathoor case. But if a modern instance of the kind arose and the question be raised again, it would probably be not an easy one to decide.

157. The estate taken by a stani in the stanom property is a limited one. It is not a mere life estate, for the stani is not only entitled absolutely to the income accruing during his life, but he has also the power of creating a charge upon the estate or of alienating it where such charge or alienation is necessary or beneficial to the estate. His position may be best likened to that of a Hindu widow with respect to the property inherited by her from her husband. [1] In *Mana Vikraman* v. *Sundaram Poltar*, [2] his position is said to be

1. See *Venkateswara Aiyar* v. *Sekhari Varma* (1881) I. L. R. 3 Mad. 384 *Mahomed* v. *Krishna* (1887) I. L. R. 11 Mad. 106.

2. (1881) I. L. R. 4 Mad. 148.

the same as that assigned to the holder of an impartible zemindary before the current of decisions was turned in 1887. The stani is according to Bhashyam Iyengar, J. in *Vidyapurna* v. *Vidyanidi* [1] a corporation sole. In *Manavedan Rajah* v. *Zamorin of Calicut* [2] another test is suggested namely that the alienee must show that the alienation is such as would be binding on the other members of the joint family if made by a manager. His debts will be binding on the successor if they are incurred for "the benefit or proper expenses of the stanom," as distinguished from his own personal benefit. [3] If the debt is one incurred for "the conservation of the stanom" it will bind the successor [4]. Ordinarily he is not entitled to make leases beyond his lifetime unless the granting of such lease be the ordinary mode in which the property of any particular kind is enjoyed [5], or is beneficial to the estate [6]. The renewal of kanoms for a period extending beyond the life of a stani is valid on this principle provided a reasonable rent is reserved [7]. He should not anticipate the time of renewal and grant a renewal before the prior kanom his expired with a view to benefit himself personally. If he does so, the person who takes the renewal takes it subject to the risk of its being repudiated by the succeeding stani who is not bound by it. Where however, the renewal before the proper time is effected for raising money for the necessities of the stanom it will, like any other transaction by which the state proposes to deal with the estate beyond his own life, he upheld by the court. Even in cases were there has been an

1. (1904) I. L. R. 27 Mad, 435. 2. (1918) 36 M. L. J. 103.

3. *Venkateswara Aiyar* v. *Sekhari Varma* (1881) I. L. R, 3 Mad. 384.

4 *Chemminikara Muppil Nair* v. *Ukona Menon* (1876) I. L. R. 1 Mad. 188.

5. *Ittirarichan Vani* v. *Kunhunni* (1897) I. L. R. 21 Mad. 144,

6. *Kuttiyali* v. *Ummamma* (1920) I, L. R. 44 M. 509 : 41 M. L. J. 202.

7. *Anantanarayana Iyer* v. *Thiruvenkatarayan* (1917) M. W. N, 707 : 33 M. L. J. 459.

anticipation, if the stani is alive and expresses approval alienation would be good and it is not open thereafter for the succeeding stani to question it [1]. He is not a mere tenant for life and is certainly not impeachable for waste. [2] He can grant a lease of forest land for a term of years reserving reasonable rent and the mere fact that the alienation is intended to enure beyond his life-time will not invalidate it. He may cut down trees for his own purposes though by the manner and the extent of his operations he may render himself liable to an action at the suit of the probable successor. It depends upon the circumstances whether an alienation by a stani or other conduct on his part in the management of his estate is of a character to render him liable to an action. By the mere cutting of trees, that being the ordinary and indeed the only way of enjoying the estate, no injury is done of which as between the stani and the successor the latter has any right to complain. Even a perpetual lease granted may in certain circumstances be valid [3]. But ordinarily of course he cannot create one and a tenure created by him will not be presumed to be such. A suit will lie at the instance of the next reversioner to have an alienation by the stani declared void beyond the life time of the stani. As in the case of reversioners, the next immediate reversioner is entitled to maintain the action if there is collusion or gross negligence on the part of the immediate reversioner. One action may be maintained as in the case of widow's alienations in respect of any number of improper alienations [4]. Adverse possession against the stani is adverse possession against his successors as well [5]. The case itself was one of trust and may be explained on the lines of *Jagannatha Rao* v. *Rama Doss* [6] but the observations seem to go

1. S. A. 774 of 1917 ; S A. 1147 of 1917. 2. (1897) 7 M. L. J. 317.
3. *Mana Vikraman* v. *Sundaram Pattar* (1881) I. L. R. 4 Mad. 148.
4. *Mahomed* v. *Krishnan* (1887) I. L. R 11 Mad. 106.
5. *Kombi Achan Sekhari Varma Valia Raja* v. *Raman Unni* (1917) I. L. R. 41 Mad 4. 6. (1904) I. L. R, 28 Mad. 197.

further and are irreconcilable with *Patinharkara Vallabhan Chattan Rajah* v. *Rama Varma* [1] unless the former case is confined to cases of trust or cases where the stanom property is involved and not merely right to the stanom. It is hardly necessary to state that no stani can make a gift of any portion of the corpus of the stanom property. With regard to accumulations of income or uncollected arrears of income of property purchased by means of accumulations, the same principles would apply as in the case of the widow's estate. He can make a will of the property so acquired by him [2].

158. A somewhat curious question arose in an unreported case [3] namely whether, when a stani died before the rent for the season accrued due, a person who had purchased his right to the income in Court auction would be entitled to the rateable proportion of the income due up to the death of the stani. The Court held following English decisions with regard to life tenants that the income must be apportioned and that the purchaser was entitled to the proportion which would be due on such apportionment at the date of the stani's death. The English decisions with regard to the life tenants are based on special statutes passed to avoid the hardship arising from the previous state of the law; but the learned Judges of the Madras High Court held that the principles of the English statutes and decisions being based on general equitable principles should be followed in this country.

1. (1914) I. L. R. 28 M. L J. 669.
2. *Sridevi* v. *Krishnan* (1897) I. L. R. 21 Mad. 105.
3. S. A. 941 of 1901.

CHAPTER XX.

TEMPLES.

159 Temples—Classes and origin of. 160 Public and private—Caste temple settling Scheme. 161 Private temples. 162 Melkoima, nature of—Government, interference. 163 Power of District Court, 164 Travancore, Interference of Government. 165 Uralans — Legal position of — not legal owners. 166 Karnavan Uralan—position of Anandravans. 167 Uralan's powers. 168 Joint uralans—consultation and joint action, necessity for. 169 Karaima, meaning of—other servants of temple.

159. There are numerous Temples in Malabar and in the Native States of Cochin and Travancore. Many wealthy families own private temples of their own and in the case of Rajahs and Chieftains they are often situated within the precincts of their residence. Temples are said to be of four classes namely (i) ancient temples founded by Parasurama, (ii) temples founded by Rajas, (iii) temples founded by village communities and (iv) temples founded by individuals [1] Mr. Wigram adopts a slightly different classification, his class three consisting of "temples founded by village communities and individuals", whilst his class four consists of "temples founded by devotees from alms received." [2]. The temples reputed to be founded by Parasurama who was the founder and the Sovereign of Kerala do not differ materially from the second class that comprises all temples founded by Sovereigns who ruled in different parts of Malabar (except the private temples attached to their own residences which are of the nature of family chapels.). These two classes, may, therefore, be grouped together and are undoubtedly public institutions. The third and fourth classes of temples may be either public

1. See Chapter III of Kerlavakasaramam by Kerala Varman Thirumalpad.

2. Moore's Malabar Law, p. 359.

or private and it will be no easy task in particular cases to decide whether they belong to the one or the other class. The general public are as a rule allowed to worship even where the temples are private institutions, and most private temples also own more or less property. Sometimes as in the case of the Puthiakovilagom of Calicut all property used till recently to be purchased in the name of the family deity. When the question whether a particular temple is public or private arises for decision the test of course would be whether the public have a right to worship in it and if the public are as a matter of fact in the habit of worshipping and have never been denied access, it may be a legitimate ground for inferring a dedication to the public. The inference would not be conclusive and its strength would depend on the circumstances of each case. [1] In the village communities founded by Tamil Brahmins who immigrated to the country from the East Coast there is often no property specially set apart for the temple but the expenses of its upkeep are met out of the general funds of the village which consist solely of fees levied from time to time on occasions of marriage and other ceremonies in the houses of the villagers. The amount spent on the temples depends on the discretion of the villagers and may vary from time to time. It would probably not be easy to hold that these temples are public institutions, whatever may be the right view to hold with respect to the temples founded by the older village communities representing the inhabitants of a desam or a nadu. In respect of these last, all the Desakars have been held to be trustees. [2]

160. In *Yegnarama Dikshitar* v. *Gopala Pattar* [3] a question arose as to the powers of the villagers by a majority to alter a scheme of management. Both the parties proceeded on the assumption that the temple was a private temple. There

1. See *Puravuiya Goundan* v. *Parnachi Goundan* 1921 40 M. L. J. 289 for tests.

2 S. A. 1650 of 1901.

3. (1918) 8 L. W. 357.

was reference to arbitration and an award settling a scheme which was passed into a decree. Subsequently there was another meeting of the villagers which sought to alter the scheme thus settled. The question was as to whether this was competent. The point urged was that the villagers were co-owners, the temple being private property of these co-owners and therefore the majority could not bind the minority. Both the learned Judges who decided the case overruled this contention and held that the case was analogous to that of castes owning property and the decision of the majority bound the minority. The Judges differed however on the question as to whether there having been a decree of the court settling a scheme the parties could without resorting to Court substitute another scheme. On appeal it was held that the court alone could set aside the scheme, though otherwise the majority had the power to bind the minority, Mr. Justice Sadasiva Iyer was of opinion that these trusts that admitted an indefinite body like the settlers in a village must be reckoned as public trusts. In *Venkatasubbau Patter* v. *Ayyalaurai* [1], it is suggested that the relationship of the Brahmin householders, an indefinite number of persons, in respect of the village temple and its property is analogous to the case of a corporation which owns properties and that a majority of the members present at a duly convened meeting can bind the minority.

161. There are comparatively few temples in Malabar that possess any inams appropriated for their maintenance. The possession of inam property would probably be an indication though not a conclusive one, that the temple owning it is a public one. If the temple is public the manager or *uralan* is said to be subordinate to God. He is styled the God's *uralan* while the *uralan* or manager of a private temple is said to be the proprietor of it or to possess the *uraima* over it and the God is said to be the God of the *uralan*.

1. (1919) 37 M. L. J. 554.

162. As already stated it would probably be very difficult in some cases to decide whether a temple is a public or a private one. In the case of public temples the Rajah or ruler of the place possessed a general right of superintendence and was entitled to take measures to insure the application of temple property towards the trusts of the institution. This sovereign right was called the *Melkoima* which means upper-sovereignty or the right of the sovereign over temples. It seems very doubtful whether the Rajahs exercised any *Melkoima* right over temples founded by village communities. If there were an authentic record of all temples over which the *melkoima* right was exercised it would perhaps be a guide in deciding whether an institution is public or private. But it is to be doubted whether the only devaswom paimash that exists for the year 1822 is sufficiently reliable for the purpose. At any rate it has not generally commanded the confidence of the Courts [1]. The *melkoima* right, it is hardly necessary to observe, is not anything peculiar to Malabar. In all native Governments the sovereign recognised it as a specially sacred obligation to protect charities and temples. It will be found in the Mitakshara that making rules for the protection of temples was one of the recognised functions of the King [2]. What exactly was the scope of the functions exercised by them as protectors of charities it is not now easy to determine. It may be taken as beyond doubt that they suspended or dismissed trustees guilty of misappropriation or other wrongful conduct and that they took up the temporary mangement of temples when necessary. Their right to call upon managers to submit accounts would be undisputed. The managership was probably in most cases hereditary according to the custom of the country, but where it was not, the Rajahs must have taken upon themselves the function of appointing new trustees. Similarly if the family of a hereditary trustee became extinct, the Rajah would claim the right

1. See *Keshavan* v. *Vasudevan* (1884) I. L. R. 7 Mad. 297.
2. See Mitakshara Vyawaharadhyaya, commentary on verse 186.

of appointing a new trustee. Consequently some times the Rajan is entered in the paimash as the appointer of the people exercising authority. Mr. Holloway thinks that this was probably beyond the legitimate functions of the sovereign and due to the arbitrary character of the Rajah's powers [1]. The sounder view is that taken by him in another case [2], that "the appointment of fresh trustees lay with the sovereign power acting either through their courts of justice or otherwise." This power was exercised directly and not through the Courts wherever there were no hereditary trustees or where the family of hereditary trustees became extinct. In some countries the native Rajahs seem to have confirmed appointments made by some one else although probably this was in law not any substantial right but only a matter of form. In the *Rameswaram case, Muthu Ramalinga Sethupathi* v. *Perianayakam Pillai* [3], the Privy Council refer to the right exercised by the former rulers of the Madura country to visit temples and to prevent and redress abuses in their management. Mr. Nelson, the author of the Madura District Manual, says: "that the king was compelled occasionally to interfere with the mangement of the churches." The Privy Council say that the British Government inherited the visitatorial jurisdiction of the native Rajahs and that Regulation VII of 1817 merely defined the manner in which the power was thenceforth to be exercised. In *Manohar Ganesh Tambekar* v. *Lakmiram Govindram* [4] West, J., observes that "the state in its secular executive and judicial capacity, habitually intervened to prevent fraud and waste in dealing with religious endowments. It was quite in accordance with the legal consciousness of the people that the Bombay Regulation XVII of 1827 gave to the Collector the visitatorial power enabling him to enforce an honest and proper administration

1. *See* Moore's Malabar Law, p. 360 ; A. S. 118 of 1861, Tellicherry,
2. O. S. 1 of 1860 Tellicherry.
3. (1874) L. R. 1 I. A. 209 at 222, 233,
4. (1887) I. L. R. 12 Bom. 247.

of religious endowments." There is no doubt that in other parts of India as well, the rulers possessed a similar right of superintendence over charitable and religious endowments. In Appeal No. 35 of 1887 which related to the famous Guruvayur temple, Muthuswami Iyer and Parker, JJ. observe that the exercise of the *melkoima* right was "probably not limited to a passive supervision in the sense in which we now understand the sovereign right of control but that it extended to active participation in management in the capacity of its superior and superintending trustee. Having again regard to the spirit in which Hindu sovereigns identified themselves with important temples in their territory, and to the mode in which the British Government itself exercised superintendence over Hindu temples on this side of the Ghat under Regulation VII of 1817 prior to its withdrawal from direct interference in the management of the religious institutions, and to the establishment of Devasthanam amins, peishkars, and monegars, organised for the purpose of exercising supervision and control with efficiency, we do not think it is too much to say that when the ruler of the country was also a superintending trustee he appointed agents and *samudayees* and acted practically as a trustee having superior position in relation to the local uralars." The above passage shows that the powers of *melkoima* were not very well-defined in the time of the native rulers. It would be going too far to say that it is identical with *uraima* or trusteeship. In *Nilakandan* v. *Padhmanabha*[1] Muthuswami Iyer and Best, JJ. take up a more correct position and treat the melkoima right as restricted to superintendence though the learned Judges point out that after the cessation of the *melkoima* right of the defendant in the case who was the former ruler of a portion of modern Palghat, the senior member of his family exercised the functions of a trustee of the temple in question. This was precisely the case with

1. (1890) I. L. R. 14 Mad. 153.

reference to the Guruvayur temple which was the subject matter of the dispute in Appeal No. 35 of 1887, the Zamorin whose *melkoima* became extinct on the transference of the country to the British Raj having since asserted and exercised the rights of a trustee to the Guruvayar temple. The Privy Council, on appeal from the Judgment of the High Court in *Nilakandan* v. *Padhmanabha* [1] speak of the right of the *melkoima* only as the sovereign right of superintendence. Regulation VII of 1817 gave power to the Revenue Board generally to take steps to prevent malversation of the temple funds. Regulation XVII and XIX of 1810 respectively enacted a similar law for Bombay and Bengal. On account of the strong agitation in England against a Christian Government concerning itself with the administration of heathen temples, the East India Company took steps in 1812 to disconnect itself with Hindu religious institutions handing them over to such persons as they thought best. And in 1863, Act XX of 1863, was passed putting an end to the power of the Government to interfere with the religious institutions so far as Bengal and Madras were concerned, and Act VII of 1863 similarly extinguished the power of the Government in Bombay to superintend religious institutions. In Madras even while Regulation VII of 1817 was in force, the Government or the Board of Revenue did not exercise any rights under the Act over temples in Malabar, on account of a report, dated 23rd September 1817 of the Collector that all the temples in Malabar were private endowments which was of course an absolutely erroneous view. The result was that notwithstanding the legal cessation of *melkoima* right of the former rulers the latter continued in the case of some few temples to interfere in their affairs and gradually acquired by prescription joint rights of management with the legitimate *Uralars*. When the Madras Government was taking steps in 1841 to carry out

1. (1890) I. L. R. 14 Mad. 153.